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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. SCHUMER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

JOHN J. HIGGINS
JOHN T. KUELBS
DANIEL R. ALLEMEIER
HUGHES AIRCRAFT COMPANY
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
JAMES A. GASH
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioner Hughes Aircraft Company

February 15, 1996

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QUESTIONS PRESENTED

1. Whether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act.
2. Whether injury to the public fisc is an essential element of a cause of action under the False Claims Act.
3. Whether the *qui tam* provisions of the False Claims Act are unconstitutional.

PARTIES TO THE PROCEEDING

Petitioner, Hughes Aircraft Company, was appellee/cross-appellant below. Respondent, William J. Schumer (litigating on behalf of the United States of America), was appellant/cross-appellee below.

Pursuant to this Court's Rule 29.6, petitioner notes that it is a wholly-owned subsidiary of HE Holdings, Inc., which is in turn a wholly-owned subsidiary of Hughes Electronics Corporation ("HEC"). HEC, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

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Hughes Aircraft Company respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 63 F.3d 1512 (1995) and is reprinted in the Appendix ("App.") at 1a-31a.

The District Court's unpublished order denying Hughes' motions to dismiss is reprinted at App. 34a-35a. The District Court's unpublished order granting summary judgment and its findings of fact and conclusions of law are reprinted at App. 36a-64a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 22, 1995. Hughes filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on November 17, 1995. App. at 32a-33a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

The jurisdictional bar of the False Claims Act, as amended in 1986, provides in pertinent part:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

STATEMENT OF THE CASE

A. The RDP Development Project

In October 1982, petitioner Hughes Aircraft Co. entered into a subcontract with the Northrop Corporation to develop a radar system for the B-2 aircraft that Northrop was then building for the United States Air Force. App. at 42a-43a. Several months later, Hughes entered into a subcontract with the McDonnell Douglas Corporation to develop an upgraded radar system for the F-15 aircraft that McDonnell Douglas was also building for the Air Force. *Id.* at 43a-44a.

With the knowledge and encouragement of Air Force officials, Hughes set out to develop a common radar component (the Radar Data Processor or RDP) for use in both the B-2 and F-15 aircraft. *Id.* at 44a-46a. To allocate properly the cost of the RDP component between the projects, Hughes program managers on December 14, 1982 entered into a "Commonality

Agreement." *Id.* at 46a. Such agreements, used by Hughes since 1978, are internal memoranda specifying the cost allocation of common parts among multiple projects. *Id.* at 38a-39a. The RDP Commonality Agreement was subsequently re-executed on June 24, 1983 without substantive change. *Id.* at 48a.

Hughes notified both the Air Force and Northrop of the Commonality Agreements. *Id.* at 47a-48a, 56a. On January 2, 1984, Hughes filed with the Air Force a revised Cost Accounting Standards ("CAS") disclosure statement describing the commonality accounting methods established in the Agreements. *Id.* at 56a. Hughes completed most of the RDP design by the summer of 1984, and began producing the hardware in the fall of that year. *Id.* at 49a.

B. The Government Audits

When, in the mid-1980s, the B-2 program experienced cost overruns, Northrop requested a government audit of Hughes' accounting methods. *Id.* at 3a. Accordingly, the Government launched an investigation into Hughes' allocation of the RDP costs between the B-2 and F-15 projects.

During the course of the government investigation, allegations of improper accounting were widely discussed among Hughes, Northrop, and government personnel. A series of government audit reports prepared between 1986 and 1988 concluded that Hughes had inappropriately charged to the B-2 program expenditures that should have been charged to the F-15 program. *Id.* at 3a. As a result, the Government withheld approximately $15.4 million in payments under the B-2 subcontract. *Id.*

After an exhaustive investigation, however, the Government ultimately concluded that Hughes had complied with the applicable cost-reimbursement regulations, and that the RDP Commonality Agreements had actually *saved* the Government money. App. at 65a-68a; *see also id.* at 4a. Accordingly, the

Government withdrew its earlier finding of noncompliance and paid Hughes the $15.4 million previously withheld on the B-2 project. *Id.* at 4a.

C. The Schumer Complaint

In January 1989, respondent William J. Schumer, then employed by Hughes as an Assistant Division Contracts Manager, filed this action under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. That Act authorizes a private individual under certain circumstances to bring a suit on behalf of the United States against any party who "knowingly presents . . . a false or fraudulent claim" to the United States Government. 31 U.S.C. § 3729(a).

Schumer's complaint alleged that Hughes had violated the FCA by mischarging costs, pursuant to the Commonality Agreements, from the fixed-price F-15 contract to the cost-reimbursement B-2 contract. The complaint further alleged that, as a result of the Commonality Agreements, Hughes had overcharged the U.S. Government by $40 million. The complaint sought treble damages of $120 million. (Schumer subsequently amended the complaint to allege an overcharge of $50 million and to request treble damages of $150 million.) Under the FCA, Schumer would be entitled to a maximum of 30% and a minimum of 25% of any sums recovered, plus attorneys' fees and costs. *See* 31 U.S.C. § 3730(d)(2).

Although the United States Government has the right to intervene in and conduct the prosecution of a *qui tam* action, *see* 31 U.S.C. § 3730(b)(2), it declined to do so here.

D. The District Court Proceedings

Hughes moved to dismiss the action on three grounds. *First*, Hughes argued that the District Court lacked subject-matter jurisdiction under the FCA because, at the time of the wrongdoing alleged, the statute barred actions (like this one) "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982).

Second, Hughes argued that the District Court lacked subject-matter jurisdiction because, even as amended in 1986, the FCA barred actions (like this one) "based on the public disclosure of allegations or transactions," where (as here) the *qui tam* relator was not the "original source" of that information. 31 U.S.C. § 3730 (e)(4)(A). *Third*, Hughes argued that the *qui tam* provisions of the FCA, both before and after the 1986 amendments, were unconstitutional. The District Court (Pfaelzer, J., C.D. Cal.) summarily denied the motions in November 1990. App. at 34a-35a.

Hughes subsequently moved for summary judgment on the merits on all claims. On May 20, 1992, the District Court granted the motion. App. at 36a-37a. Based on extensive findings of fact, the Court concluded that "Schumer has not shown that Hughes violated the False Claims Act." App. at 64a. Schumer appealed on the merits, and Hughes cross-appealed on the jurisdictional and constitutional issues.

E. The Ninth Circuit Proceedings

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. App. at 1a-31a. The Court first affirmed the District Court's assertion of jurisdiction under the FCA. As an initial matter, the Court of Appeals held that the 1986 amendments relaxing the FCA's jurisdictional bar applied retroactively to the pre-1986 conduct at issue. *Id.* at 5a-7a. The Court then proceeded to interpret the amended jurisdictional bar narrowly, holding as a matter of law that no "public disclosure" occurs (1) when the Government discloses allegations of wrongdoing to a contractor's innocent employees, *id.* at 8a-11a, or (2) when government information is available to the public under the Freedom of Information Act, *id.* at 11a-14a. Finally, based on prior circuit precedent, the Court held that the *qui tam* provisions of the FCA were constitutional. *Id.* at 14a.

Turning next to the merits, the Ninth Circuit held that—*notwithstanding the Government's determination that Hughes' commonality accounting methods complied with government regulations and had actually saved the Government money*—Schumer had presented "genuine issues of material fact" under the FCA by challenging (1) the adequacy of Hughes' disclosure of those methods to Northrop, *id.* at 19a-22a, and (2) the timeliness of its disclosure to the Government, *id.* at 22a-26a. While acknowledging that Schumer had not even presented the latter claim in his complaint, the Court held that, as a matter of law, claims raised in a brief in opposition to summary judgment must be treated as a *de facto* amendment to a complaint. *Id.* at 22a-23a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED IN INTERPRETING AND APPLYING THE 1986 AMENDMENTS TO THE JURISDICTIONAL BAR OF THE FALSE CLAIMS ACT.

Congress amended the *qui tam* provisions of the False Claims Act in 1986 to "'encourage more private enforcement suits'" alleging fraud against the United States Government. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 23-24). The 1986 amendments, among other things, relaxed the statute's jurisdictional bar. As a result, the number of such actions has skyrocketed in recent years. According to the Department of Justice, some 1,100 FCA *qui tam* suits have been filed in the decade since the 1986 amendments—as opposed to some 20 suits in the previous decade. *See* D.O.J. News Release (October 18, 1995) (reported at 1995 WL 614572).

The 1986 FCA amendments sparked not only an explosion of *qui tam* lawsuits, but also judicial conflict and confusion. In particular, the courts of appeals are divided on a host of issues involving the interpretation and application of the amended jurisdictional bar. This case squarely presents three of those circuit splits. Before addressing those splits, however, it is helpful to understand the background of the 1986 amendments.

The FCA was originally enacted in 1863 to assist the Government in ferreting out fraud by Civil War contractors. *See, e.g., United States v. McNinch*, 356 U.S. 595, 599 (1958); *Stinson*, 944 F.2d at 1153. The 1863 Act contained a broad *qui tam* provision allowing "any person" to prosecute a claim on behalf of the United States "against any person who knowingly submitted a false claim to the Government." *Id.* A successful *qui tam* relator was entitled to half of any damages recovered. *Id.*

Notwithstanding their broad scope, the *qui tam* provisions of the 1863 Act were little invoked for almost a century. In 1943, however, this Court construed the FCA to allow a *qui tam* action based entirely on information copied from a criminal indictment. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943). Taking a dim view of such "parasitic" actions, Congress immediately amended the Act to bar jurisdiction over actions "based on evidence or information the government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982)

As so amended, the Act barred not only "parasitic" actions like *Marcus*, but also actions brought by "whistleblowers" who had themselves alerted the Government to fraud. *See, e.g., United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1102-06 (7th Cir. 1984). In an effort to encourage *qui tam* actions, Congress in 1986 relaxed the jurisdictional bar. As amended, the FCA allows *qui tam* actions unless "based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A) (emphasis added).[1]

The 1986 amendments to the FCA's jurisdictional bar thus sought to strike a balance between "the almost unrestrained permissiveness represented by the *Marcus* decision, and the restrictiveness of the post-1943 cases, which precluded suit even by the original sources." *Stinson*, 944 F.2d at 1154 (citations omitted). The amended jurisdictional bar, accordingly, continued to preclude "parasitic" suits, while seeking to

[1] The 1986 amendments also sought to encourage *qui tam* actions by extending the statute of limitations, *see* 31 U.S.C. § 3731, reducing the *scienter* requirement, *id.* at § 3729(b), lowering the burden of proof, *id.* at § 3731(c), increasing the statutory penalties, *id.* at § 3729(a), and increasing the bounty available to *qui tam* relators, *id.* at §§ 3730(d)(1) & (2).

encourage "whistleblower" suits by those who exposed fraud against the Government. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319, 321-22 (2d Cir. 1992); *see also United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649, 651 (D.C. Cir. 1994); *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2579 (1995).

A. The Courts of Appeals Are Divided on the Retroactive Effect of the Jurisdictional Bar As Amended in 1986.

The threshold question in this case is whether the relaxed FCA jurisdictional bar as amended in 1986 applies retroactively to authorize *qui tam* actions based on alleged wrongdoing *prior* to 1986. On this question, the courts of appeals are in clear conflict.

The Ninth Circuit held below that the relaxed jurisdictional bar did indeed apply retroactively, authorizing *qui tam* actions barred at the time of the wrongdoing alleged. App. at 5a-7a. While paying lip service to the rule that statutes are presumed to apply prospectively only, the Court held that the FCA's amended jurisdictional bar fell within an "exception to that rule in the case of jurisdictional statutes." *Id.* at 6a. Retroactive application of the amended jurisdictional bar, the Court asserted, would not have a "deleterious effect" on Hughes' "substantive rights" because it "did not alter [any] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability." *Id.* at 7a (internal quotation omitted).

The Sixth Circuit, in contrast, has refused to apply the FCA's relaxed jurisdictional bar to *qui tam* actions challenging conduct that preceded the 1986 FCA amendments. *See United States v. TRW, Inc.*, 4 F.3d 417, 422-23 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994). The *TRW* Court expressly rejected the argument that those amendments "fall under [the]

narrow exception" to the general rule that statutes are presumed to apply prospectively only. *Id.* at 422-23. Retroactive application of the relaxed jurisdictional bar, the Court observed, would affect substantive rights by, among other things, "expand[ing] the circumstances under which citizens may bring false claims suits." *Id.* at 422. Accordingly, the *TRW* Court proceeded to apply the broader jurisdictional bar in effect before the 1986 amendments.[2]

The decision below not only created a split with the Sixth Circuit, but reached an incorrect result. This Court has recently reaffirmed the general rule that statutes are not to be given retroactive effect absent clear legislative intent. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994). To be sure, that rule does not apply where a statutory change is merely procedural and does not "attac[h] new legal consequences to events completed before its enactment." *Id.* at 1499. The 1986 amendments to the FCA's jurisdictional bar, however, do not fall within that narrow exception.

Retroactive application of the amended jurisdictional bar self-evidently attaches new legal consequences to a *qui tam* defendant's past conduct. But for the 1986 amendments, this action would have been readily dismissed—only the Government could have sued Hughes, but it declined to do so or even to intervene here. Retroactive application of the relaxed jurisdictional bar, thus, deprives Hughes of an absolute defense to this action, and opens the door to potential multimillion-dollar liability. Such retroactive liability is particularly inappropriate under the FCA, a statute at least quasi-criminal in nature. *See, e.g., United States ex rel. Weinberger v.*

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[2] Although *TRW* was decided before this Court's recent decision in *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994), the Sixth Circuit applied the traditional retroactivity analysis reaffirmed in that decision. Indeed, this Court denied *certiorari* in *TRW* less than a month before announcing its decision in *Landgraf*. *See* 114 S. Ct. 1370 (1994).

Equifax, Inc., 557 F.2d 456, 460 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *cf. United States v. Halper*, 490 U.S. 435, 449-50 (1989) (applying double jeopardy analysis to FCA penalties).

B. The Courts of Appeals Are Divided on the Meaning of "Public Disclosure" As Used in the Amended Jurisdictional Bar.

After holding that the amended jurisdictional bar applies retroactively, the Ninth Circuit held that the bar did not preclude this action because there had been no "public disclosure" of the allegations involved. The Ninth Circuit's narrow interpretation of "public disclosure" creates two distinct circuit splits over the meaning of that key statutory term.

1. The Courts of Appeals Are Divided on Whether Government Disclosure of Allegations of Misconduct To a Contractor's Innocent Employees Constitutes "Public Disclosure."

The Ninth Circuit first held as a matter of law that government disclosure of an alleged fraud to "innocent employees" of a government contractor (*i.e.*, those not involved in the alleged fraud) was not a "public disclosure" within the meaning of the amended jurisdictional bar. App. at 8a-11a. The Court thus rejected Hughes' argument that this action should be dismissed because it is based on information that Schumer obtained from the Government's mid-1980s investigation and audits of Hughes' RDP Commonality Agreements.[3]

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[3] Because the Ninth Circuit concluded as a matter of law that no "public disclosure" had occurred in this case, it did not reach the question whether this action is "based upon" any such disclosure. *See* App. at 14a. The Courts of Appeals are also divided on the meaning of the term "based upon." *Compare United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.) (action "based upon" public disclosure only

(continued...)

The Ninth Circuit explicitly based its narrow interpretation of "public disclosure" on the assumption that employees of government contractors are unlikely to bring *qui tam* actions because of their interest in retaining their jobs. "Unlike others who come across information related to fraud, an innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy." App. at 9a (internal quotation omitted). "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Id.*

The Ninth Circuit expressly rejected a Second Circuit decision holding that disclosure of alleged misconduct to a contractor's innocent employees during the course of a government investigation *is* "public disclosure" within the meaning of the amended jurisdictional bar. App. at 8a-11a (rejecting *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992)). The Second Circuit, in contrast to the Ninth, refused to interpret "public disclosure" to require disclosure to the public "at large." *Doe*, 960 F.2d at 323. Rather, the *Doe* Court held, "public disclosure" takes place whenever an alleged fraud is "actually divulged to strangers to the fraud," including a contractor's "innocent employees." *Id.* at 322. "Once allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw

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[3] (...continued)
when *actually* derived from disclosure), *cert. denied*, 115 S. Ct. 316 (1994), *with United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.) (action "based upon" public disclosure when involving same subject matter, regardless of whether *actually* derived from disclosure), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (same), *cert. denied*, 507 U.S. 951 (1993).

a cloak of secrecy around the allegations; they are irretrievably released into the public domain." *Id.* at 323.

Hewing to its avowedly policy-based interpretation of "public disclosure," the Ninth Circuit dismissed the Second Circuit's contrary interpretation as "unrealistic." App. at 9a. To construe disclosure to innocent employees as "public disclosure," the Ninth Circuit asserted, would "drastically curtai[l] the ability of insiders to bring suit once the government becomes involved in the matter." *Id.* at 10a. That result, the Ninth Circuit theorized, would be "contrary to the intent of the statute." *Id.* at 11a. "Thus, we reject the *Doe* court's definition of 'public disclosure,' which forecloses many insiders from bringing *qui tam* actions." *Id.*, *see also id.* at 9a ("We decline to adopt the rule of *Doe* for application in this circuit.")

The Ninth Circuit's holding not only conflicts squarely with *Doe*, but contravenes the plain language of the statute. The term "public disclosure" on its face does not require disclosure to the *general* public. To the contrary, the statute contemplates "public disclosure" through means often unknown and incomprehensible to the general public, including (as involved here) government "audit[s]" and "investigation[s]." 31 U.S.C. § 3730(e)(4)(A).

The Ninth Circuit's policy arguments are also flimsy at best. The 1986 amendments to the FCA did not seek to encourage *any and all qui tam* actions, but rather actions by "whistleblowers" who contribute valuable information to the Government. The Ninth Circuit's narrow interpretation of "public disclosure" is an open invitation to "parasitic" lawsuits by employees (like Schumer) who learn of an alleged fraud through a government investigation of their employer. Once the Government has launched an investigation into alleged wrongdoing, by definition it is "on the trail of the alleged fraud without [the relator's] assistance." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995). Under these circumstances, a *qui tam* action serves no useful purpose.

Thus, as a matter of policy as well as statutory text, innocent employees who learn of an alleged fraud through a government investigation should be precluded from filing a *qui tam* action unless they qualify as an "original source" of that information.[4]

Indeed, if innocent employees are free to file a *qui tam* action based on information learned from a government investigation of their employer, such actions can be expected as a matter of routine whenever the Government audits a contractor. The Ninth Circuit shrugged off this concern by observing that "any such effect would be limited to a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit." App. at 11a. That observation (even if correct) offers scant reassurance to government contractors: it simply encourages a race to the courthouse among opportunistic employees hoping to capitalize on adverse government findings.

Moreover, the Ninth Circuit's core assumption—that innocent employees are unlikely to bring *qui tam* actions for fear of retaliation—is not only speculative but fanciful. Among the 1986 amendments to the FCA is a provision guaranteeing full protection to employees who file *qui tam* actions. *See* 31 U.S.C. § 3730(h). Congress, unlike the panel below, understood full well that most *qui tam* actions (like this one) are filed not by members of the public at large, but by an accused contractor's own employees. Indeed, the Ninth Circuit *en banc* recently observed that "the paradigm *qui tam* case is one in which an insider at a private company brings an action against his own employer." *United States ex rel. Fine v. Chevron*, 72 F.3d 740, 742 (9th Cir. 1995) *(en banc)*.[5]

Finally, even if the correct interpretation of "public disclosure" presented a close question, this Court should adopt the interpretation that avoids the need to address the serious constitutional questions discussed below in Part III. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 343 (1974); *Schneider v. Smith*, 390 U.S. 17, 26 & n.5 (1968); *United States v. Rumely*, 345 U.S. 41, 45 (1953); *Crowell v. Benson*, 285 U.S. 22, 62 & n.30 (1932). To the extent this action and others are jurisdictionally barred as based on "public disclosure," this Court and others need not address those thorny questions.

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[4] Because the Ninth Circuit concluded as a matter of law that no "public disclosure" had occurred in this case, it did not reach the question whether Schumer was an "original source" of the Government's information. App. at 14a. The Courts of Appeals are also divided on the interpretation of "original source." *Compare Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) ("original source" may bring *qui tam* action notwithstanding "public disclosure" only where he was actual source of disclosure); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16-17 (2d Cir. 1990) (same), *with Siller*, 21 F.3d at 1351 ("original source" may bring *qui tam* action notwithstanding "public disclosure" *regardless* of whether he was actual source of disclosure); *United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 n.13 (11th Cir. 1994) *(per curiam)* (same).

[5] Even if the panel below were correct that, for fear of retaliation, innocent employees are unlikely to file *qui tam* actions against their employers, in this case the government investigation and audits were disclosed not only to *Hughes'* innocent employees, but also to *Northrop's*. The Ninth Circuit dismissed that point by asserting that all government contractors and their employees "operate within a closed loop of secrecy." App. at 9a. That assertion is baseless. Even if innocent employees were chilled from blowing the whistle on their *own* employers, there is no reason to suppose that they would be chilled from blowing the whistle on *other* employers. To the contrary, prime contractors have a strong financial incentive to ensure that their subcontractors do not overcharge. Indeed, in this very case, it was Northrop employees who launched the government investigation of Hughes.

2. The Courts of Appeals Are Divided on Whether the Availability of Government Documents To the Public Constitutes "Public Disclosure" Regardless of Whether a Member of the Public Has Actually Obtained Those Documents.

After holding as a matter of law that no "public disclosure" occurs when innocent employees are informed of a government investigation, the Ninth Circuit next rejected Hughes' alternative argument that documents are "publicly disclosed" when available under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 . The Court did not dispute the proposition that documents are "publicly disclosed" when they are *available* to the public. Rather, the Court drew a distinction between "actual" and "potential" availability, holding as a matter of law that no "public disclosure" under FOIA occurs unless and until "a member of the public requests the information *and receives it* from the government." App. at 13a (emphasis in original). "Only then is the information *actually*, rather than *theoretically* or *potentially*, available to the public." *Id.* (emphasis in original). Thus, although the government audit reports describing Hughes' alleged misallocation of RDP costs were available to the public under FOIA—and were *in fact* obtained by Schumer pursuant to a FOIA request—the Ninth Circuit held that the reports were not "publicly disclosed" until Schumer *actually* obtained them, after filing this action. *Id.*

The Ninth Circuit based its reasoning on a D.C. Circuit opinion construing "public disclosure" within the meaning of the FCA jurisdictional bar by drawing the same distinction between "actually" and "potentially" available information. *See* App. at 12a-13a (discussing *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994)). The *Quinn* Court, like the panel below, held as a matter of law that "public disclosure" occurs only when documents are "*actually* made public" as opposed to when

documents are "only *theoretically* available upon the public's request." *Quinn*, 14 F.3d at 652 (emphasis in original).

That approach conflicts with cases from the Second and Third Circuits holding that documents are "publicly disclosed" *whenever* they are available to the public, regardless of whether a member of the public *actually* requests and receives the documents. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991). Both *Kreindler* and *Stinson* involved *qui tam* actions brought by law firms based on information regarding alleged frauds on the Government obtained during civil discovery on behalf of clients. Both the Second and Third Circuits ordered the actions dismissed on the ground that the information had been "publicly disclosed" because it was "potentially accessible" to any member of the public who consulted court files. *Kreindler*, 985 F.2d at 1158; *Stinson*, 944 F.2d at 1158; *see also Doe*, 960 F.2d at 322 ("*Potential* accessibility by those not a party to the fraud was the touchstone of public disclosure" in *Stinson*) (emphasis added).

The Ninth Circuit's insistence that documents "potentially accessible" to the public are not "publicly disclosed" not only deepens a circuit split, but rests on shaky logical foundations. The asserted distinction between "actual" and "potential" availability is contrived: material that is available to the public is "publicly disclosed" within the meaning of the FCA both before and after a member of the public actually obtains it.

Indeed, the most natural reading of the statute is that information revealed "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," like information "from the news media" is *per se* "publicly disclosed." 31 U.S.C. § 3730(e)(4). Under that commonsense interpretation,

private *qui tam* suits are barred once the Government has taken affirmative steps to redress the alleged fraud, or once it has been disseminated to the general public by the media.

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER INJURY TO THE PUBLIC FISC IS AN ESSENTIAL ELEMENT OF A CAUSE OF ACTION UNDER THE FALSE CLAIMS ACT.

After setting forth the expansive interpretation of *qui tam* jurisdiction described above, the Ninth Circuit proceeded to set forth a similarly expansive interpretation of substantive liability under the False Claims Act. Notwithstanding the Government's determination that Hughes' commonality accounting methods complied with applicable cost-accounting regulations and had actually saved the Government money, *see* App. at 65a-68a, the Court held that Schumer had presented "genuine issues of material fact" under the FCA regarding Hughes' disclosure of those accounting methods to Northrop and to the Government. *Id.* at 19a-26a. That holding fundamentally misconstrues the False Claims Act, and conflicts with decisions from other courts of appeals.

Before addressing that holding, however, it is first necessary to address the Ninth Circuit's preliminary procedural ruling that, as a matter of law, new claims raised in Schumer's brief in opposition to summary judgment must be treated as a *de facto* amendment of his complaint. *Id.* at 22a-23a. That ruling ignores fundamental principles of civil procedure, and also conflicts with decisions from other courts of appeals.

A. The Courts of Appeals Are Divided on Whether Claims Raised in a Brief in Opposition to Summary Judgment Must Be Construed as *De Facto* Amendments to a Complaint.

The Ninth Circuit freely acknowledged that Schumer failed to allege in his complaint his current claims that Hughes violated the FCA by failing to comply with the Government's

Cost Accounting Standards ("CAS"). *See* App. at 22a. The Court, however, held that Schumer had *de facto* amended his complaint by raising these claims in his brief in opposition to Hughes' motion for summary judgment. "[W]hen a party raises a claim in materials filed in opposition to a motion for summary judgment, the district court should treat the filing as a request to amend the pleadings and should consider whether the evidence presented creates a triable issue of material fact." *Id.* at 22a-23a (citing *Apache Survival Coalition v. United States*, 21 F.3d 895, 910-11 (9th Cir. 1994); *Johnson v. Mateer*, 625 F.2d 240, 242 (9th Cir. 1980); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1052-54 & n.68 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982)).

That ruling squarely conflicts with holdings from the Seventh Circuit. *See Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991) (plaintiff's "attempt to amend [his complaint] by briefs in opposition to summary judgment and on appeal is both untimely and improper"); *see also Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) (noting "basic principle" that "complaint may not be amended by the briefs in opposition to a motion to dismiss"); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."), *cert. denied*, 470 U.S. 1054 (1985); *cf. Northington v. McGoff*, No. 91-1252, 1992 WL 149918, at *4 (10th Cir. June 25, 1992) (citing *Pritchard* with approval for proposition that "complaint may not be amended by brief in opposition to motion for summary judgment").

The Ninth Circuit's rule goes well beyond the traditional presumption in favor of liberal amendment of complaints. Indeed, the rule subverts the core purpose of a complaint: to put the defendant and the court on notice of the plaintiff's claims. *See, e.g., Pritchard*, 945 F.2d at 191 ("The defendant and the

court should not be left to speculate as to what theory the plaintiff may be pursuing."). The Ninth Circuit's rule of *"de facto"* amendment also subverts proper summary judgment procedures by transforming complaints into constantly moving targets. The rule is particularly inappropriate in cases (like this one) involving allegations of fraud. *See, e.g., Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) (FCA complaints must be pleaded "with particularity" pursuant to Fed. R. Civ. P. 9(b)).[6]

B. The Courts of Appeals Are Divided on Whether Injury To the Public Fisc is an Essential Element of a Cause of Action Under the False Claims Act.

On the merits, the Ninth Circuit held that Schumer had presented "genuine issues of material fact" under the FCA relating to (1) the adequacy of Hughes' disclosure of its commonality accounting methods to Northrop, *see* App. at 19a-20a, and (2) the timeliness of Hughes' disclosure of those accounting methods to the Government, *see id.* at 25a-26a. While acknowledging the Government's determination that Hughes' commonality accounting methods "had actually saved the government money," *id.* at 4a, the Ninth Circuit held that Schumer's challenges to Hughes' disclosure of those accounting methods *per se* stated a cause of action under the False Claims Act. "[T]he lack of a determination of *actual harm* from the CAS violation does not preclude a claim under the FCA." *Id.* at 25a (emphasis added).[7]

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[6] The Ninth Circuit's rule also leads to the anomalous result that a district court has discretion to deny a formal motion to amend a complaint under Fed. R. Civ. P. 15, *see* App. 28a-29a, but no such discretion to deny a *"de facto"* amendment when a plaintiff raises a new claim in a brief in opposition to summary judgment.

[7] The Ninth Circuit also suggested that the alleged defects in Hughes' disclosure of its commonality accounting methods to Northrop and the Government "may" have rendered unspecified costs "unallowable" within

(continued...)

The FCA, however, is not a Code of Procedural Regularity in government contracts. The statute requires a false or fraudulent "claim" against the public fisc. A purely technical violation of government contracting standards that does not result in any such "claim" thus fails to state a cause of action under the FCA. *See, e.g., United States v. American Heart Research Found., Inc.*, 996 F.2d 7, 10 (1st Cir. 1993); *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 607-08 (8th Cir. 1992); *United States v. Azzarelli Constr. Co.*, 647 F.2d 757, 759-62 (7th Cir. 1981). Indeed, the FCA itself characterizes "damages" as an "essential elemen[t] of the cause of action." *See* 31 U.S.C. § 3731(c).

In support of its contrary holding, the Ninth Circuit cited *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956), and *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D. Pa. 1991). *See* App. at 25a. But those cases simply recite the unremarkable proposition that the Government need not prove "actual" or "specific" damages to recover under the FCA. As the Seventh Circuit has explained, "[t]he lack of any requirement of specific evidence of *damages* does not dispense with the need to establish an *injury*." *Azzarelli*, 647 F.2d at 762

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[7] (...continued)
the meaning of a federal regulation. App. at 19a, 25a (citing 48 C.F.R. § 31.201-2(a)). That suggestion is baseless as a matter of law and fact. The Government's Contracting Officer determined that Hughes' commonality accounting methods complied with applicable regulations, and that no adjustment to the contract price should be made. *See* App. at 67a-68a. Accordingly, the Government paid Hughes the $15.4 million that had been withheld during the course of the investigation. Under black-letter government-contracts law, "a determination by a contracting officer that a cost is allowable, combined with payment of that cost, binds the Government so that no challenge to the allowability of the cost can be maintained." J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993) (citing cases). Thus, Schumer has presented no "genuine issue of material fact" regarding any "unallowable" cost, much less any "genuine issue of material fact" regarding any violation of the False Claims Act.

(emphasis added) (citing *Rex Trailer*, 350 U.S. at 152-53). *See also United States v. Halper*, 490 U.S. 435, 445 (1989) (stressing that "Government *did* sustain injury" in *Rex Trailer*) (emphasis added).

The Ninth Circuit thus erred in holding that a cause of action under the FCA does not require any showing of injury to the public fisc. To the contrary, the adequacy of Hughes' disclosure of its commonality accounting methods to Northrop and the timeliness of its disclosure to the Government are relevant under the FCA only insofar as they resulted in some false or fraudulent "claim" injuring the public fisc. Because Schumer failed to present a "genuine issue of material fact" regarding any such claim, by definition his challenges to Hughes' disclosure of its commonality accounting methods are not "material."

III. THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT ARE UNCONSTITUTIONAL.

Finally, relying on precedents from the Ninth and Second Circuits, the court below summarily rejected Hughes' contention that the *qui tam* provisions of the FCA are unconstitutional. App. at 14a (citing *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747-59 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993), and *Kreindler*, 985 F.3d at 1153-55)).

That holding presents constitutional questions of the first order. Although the U.S. Code has long included *qui tam* provisions of various sorts, this Court has never addressed their constitutionality. In light of the recent explosion of *qui tam* litigation under the amended FCA, the issue is especially timely. Although no court of appeals has held *qui tam* actions unconstitutional, the issue remains unsettled. Indeed, the Office of Legal Counsel in the Department of Justice formally opined during the previous Administration that the FCA's *qui tam* provisions are "patently unconstitutional," and that "[i]n our view, this is not even a close question." Memorandum from Asst. Attorney General William P. Barr to Attorney General Dick Thornburgh (July 18, 1989), 13 Op. O.L.C. 249, 251 (1989) (reported at 1989 WL 418317). The constitutionality of *qui tam* actions, moreover, has been much debated in the academy.[8] Because resolution of the statutory issues in this case necessarily implicates these important and ripe underlying constitutional issues, *see supra* at 15, this Court should grant *certiorari* on all issues.

A. The *Qui Tam* Provisions of the False Claims Act Violate the Separation of Powers.

The *qui tam* provisions of the FCA are unconstitutional, first and foremost, because they violate the fundamental separation of powers between the Executive and Legislative Branches of the Federal Government. The core function of the Executive Branch (as its name suggests) is to execute the laws. That function, under basic separation-of-powers principles, is forbidden to the Legislative Branch. Consistent with those principles, Congress may not deputize private parties at will to execute the laws on behalf of the United States. If Congress had plenary authority to vest in private parties the core power of executing the law, the constitutional balance of power would be radically altered.

Private *qui tam* suits are a manifest encroachment on executive power. The FCA "let[s] loose a posse of *ad hoc*

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[8] *Compare, e.g.*, Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989) (endorsing constitutionality of *qui tam* actions); Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543 (1990) (same) *with* Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J.L. & Pub. Pol'y 701 (1993) (challenging constitutionality of *qui tam* actions); Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 Idaho L. Rev. 319 (1990) (same).

deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992). The Attorney General plays no role in appointing *qui tam* relators, and cannot prevent a *qui tam* action from being filed. Although the Attorney General has the right to intervene in an action, *see* 31 U.S.C. § 3730(b)(2), she can neither remove the relator nor apparently dismiss the action without court approval, *see id.* § 3730(c)(2).[9]

Indeed, it is no secret that Congress amended the FCA in 1986 as a result of dissatisfaction with the Executive's vigor in enforcing the law. *See, e.g.*, S. Rep. No. 345, 99th Cong., 2d Sess. 25-26 (1986) (amendments allow *qui tam* relators to "ac[t] as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason"); H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986) ("[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."). Indeed, this case dramatically underscores the reality of *qui tam* encroachment on executive power: Schumer has continued to press this action on behalf of the United States notwithstanding the Executive's conclusion that it is unwarranted.

B. The *Qui Tam* Provisions of the False Claims Act Violate the Appointments Clause.

It follows from the foregoing general discussion of separation of powers that the *qui tam* provisions of the FCA also violate the Appointments Clause, Art. II, § 2, cl. 2. By litigating on behalf of the United States, *qui tam* relators exercise significant governmental authority and must be appointed consistent with the Appointments Clause. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 124-27, 140 (1976) *(per curiam)*. Even assuming that *qui tam* relators are "inferior Officers" (as opposed to "Officers of the United States") within the meaning of that Clause, Congress can vest their appointment only in the President, the "Courts of Law," or the "Heads of Departments." *Id.* *Qui tam* relators, of course, are appointed by no one but themselves. Congress may not, consistent with the Appointments Clause, assign execution of the laws to such self-appointed officers. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 485-86 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring) (in construing Appointments Clause, "we have refused to tolerate any intrusion by the Legislative Branch" and rejected a "balancing approach").

C. The *Qui Tam* Provisions of the False Claims Act Violate the Standing Requirements of Article III.

Finally, *qui tam* actions are unconstitutional because *qui tam* relators lack the threshold "irreducible constitutional minimum" requirement necessary for Article III standing: injury-in-fact. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *Qui tam* relators suffer no "concrete and particularized" injury: their only conceivable injury is an insufficient "generalized grievance" shared by all taxpayers. *See, e.g., United States v. Hays*, 115 S. Ct. 2431, 2435 (1995) (internal quotation omitted); *Lujan*, 504 U.S. at 573-74; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

In *Kreindler*, however, the Second Circuit held that FCA *qui tam* relators have standing because Congress gave it to them: "Congress . . . may create a legal interest and confer standing to assert it." 985 F.2d at 1153. That theory, however, ignores the settled principle that the injury-in-fact requirement of

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[9] This judicial oversight of decisions traditionally within the sole discretion of the Executive Branch raises its own separation-of-powers problems. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion.").

Article III is constitutional in nature, and cannot by abrogated by legislative fiat. *See, e.g., Lujan*, 504 U.S. at 576-78 (Congress cannot confer standing on plaintiffs who lack injury in fact); *Valley Forge*, 454 U.S. at 488 n.24 (no "[c]ongressional enactment . . . can lower the threshold requirement for standing under Article III"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima.").

Rather than relying on *Kreindler's* "congressional authorization" theory, the Ninth Circuit in *Kelly* and *Madden* held that "the FCA effectively assigns the government's claims to *qui tam* plaintiffs . . . who then may sue based upon an injury to the federal treasury." *Kelly*, 9 F.3d at 748. This *de facto* "assignment" theory, however, is nothing but a semantic reformulation of the "congressional authorization" theory described above. Under the Ninth Circuit's expansive approach to "assignment," Congress could confer standing at will by simply purporting to "assign" claims to individuals who would otherwise lack standing. Indeed, Congress would not even have to *purport* to "assign" those claims; *Kelly* and *Madden* rely on shadowy notions of "constructive" assignment.

Finally, both *Kreindler* and *Kelly* suggested that *qui tam* relators may have standing in light of the prospective bounty. *See Kelly*, 9 F.3d at 749; *Kreindler*, 985 F.2d at 1154. This Court noted that theory of standing in *Lujan*, but expressly declined to address it. *See* 504 U.S. at 572-73. A mere desire to obtain a bounty, however, cannot reasonably be characterized as an injury-in-fact. *Cf. Diamond v. Charles*, 476 U.S. 54, 69-71 (1986); *In re Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1868); *United States v. Morris*, 23 U.S. (10 Wheat.) 246 (1825). Again, endorsement of such a theory would undermine Article III by allowing Congress to confer standing at will by creating statutory bounties.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JOHN J. HIGGINS
JOHN T. KUELBS
DANIEL R. ALLEMEIER
HUGHES AIRCRAFT COMPANY
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
JAMES A. GASH
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioner Hughes Aircraft Company

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-55759, 92-55857

United States of America, *ex rel.*, William J. Schumer,

Plaintiff-Appellant-Cross-Appellee,

v.

Hughes Aircraft Company,

Defendant-Appellee-Cross-Appellant.

Argued and Submitted Feb. 4, 1994
Decided Aug. 22, 1995

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judges.

D.W. NELSON, Circuit Judge:

Appellant William J. Schumer, a former manager at Hughes Aircraft Company ("Hughes"), filed suit against Hughes under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. Schumer asserted that Hughes had defrauded the United States government by

entering into unauthorized and illegal "commonality agreements" to allocate certain costs of projects over more than one subcontract. The district court granted summary judgment in favor of Hughes. We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's grant of summary judgment on Schumer's claims that Hughes failed to disclose properly the terms of its commonality agreements to its customer and that Hughes did not comply with the disclosure requirements of the Cost Accounting Standards. We affirm the district court's rulings on Schumer's remaining claims.

After Schumer filed this appeal, Hughes filed a cross-appeal, alleging that the 1986 amendments to the FCA do not apply retrospectively to this claim and that, alternatively, the statute's jurisdictional bar against claims based on publicly disclosed allegations applies in this case. We reject the cross-appeal on the grounds that under the 1986 jurisdictional provision, which applies retrospectively, we find subject matter jurisdiction because the allegations central to Schumer's claims were not publicly disclosed prior to the suit.

BACKGROUND

During the 1970s and into the 1980s, Hughes was under contract to develop and produce equipment and systems for use by the United States armed forces. Among its contracts were projects relating to the development of radar systems for the F-15 and F-18 fighter planes. In 1982, Hughes agreed to serve as the subcontractor for Northrop Corporation ("Northrop") to develop a radar system to meet the requirements of the new B-2 bomber program.

Hughes soon found that certain components developed for use in the B-2 radar system, such as the Analog Signal Converter and the Radar Data Processor, had utility as components for other Hughes aircraft projects that it was under

subcontract to develop, such as the F-15 Multi-Stage Improvement Program ("F-15 MSIP"). Accordingly, the Hughes program managers for these projects entered into internal "commonality agreements," by which Hughes committed to allocate the costs of development of such common components to either the B-2 or F-15 account, presumably with the consent of the general contractors of both programs and the United States Air Force. The development costs of the RDP were all charged to the F-15 program, and the costs of the ASC were charged to the B-2 program.

After the F-15 program experienced major cost overruns in the mid-1980s, Northrop requested a government audit of Hughes's accounting practices. The results of these audits raised concerns over whether Hughes had properly allocated costs between the contracts and whether Hughes had secured the consent of Northrop and the Air Force. A June 1986 audit, classified as "secret," concluded that the actual allocation under Hughes's commonality agreement did not reflect the terms of the subcontracts. Specifically, the report alleged that Hughes had inappropriately charged expenditures to the B-2 program that should have been borne by the F-15 program, with the effect that the losses to the F-15 contract were artificially reduced at the expense of the B-2 program. Subsequent audits conducted between 1986 and 1988 concluded that the commonality agreements had not been authorized and had not been reflected properly in accounting disclosure statements. As a result, the government withheld payment to Hughes of approximately $15.4 million in costs charged to the B-2 program.

Appellant William J. Schumer, a manager in the Radar Systems Group of Hughes, participated in the negotiations with Northrop that resulted in the B-2 subcontract. He contends that in 1983 his supervisor asked him to draft commonality

agreements between the B-2, F-14, and F-15 programs and instructed him not to inform the contractors of the agreements. Believing such agreements to be illegal, Schumer refused to do so. In 1987, Schumer was removed from the B-2 project.

In January 1989, Appellant filed a complaint against Hughes under the *qui tam* provisions of the FCA, which authorize a private individual to bring an action on his own behalf and on behalf of the government against a party who "knowingly presents ... a false or fraudulent claim" to the United States government. 31 U.S.C. § 3729. The government conducted a sixteen month investigation of the matter, but ultimately declined to intervene in the case. Because audits conducted in 1990 and 1991 revealed that Hughes's pooling arrangement had actually saved the government money, the government withdrew an earlier finding of noncompliance.

Schumer's amended complaint alleged that Hughes had "misbid, misallocated, and mischarged" the costs of F-14, F-15, F-18, and B-2 programs, and that the commonality agreements had been established without the knowledge of the Air Force or the contractors. After an unsuccessful motion to dismiss for lack of subject matter jurisdiction, Hughes moved for summary judgment. The district court granted the motion, finding that Hughes had properly informed and secured the approval of the Air Force and all but one of the relevant contractors for the commonality agreements, and that any failure to inform was excusable because of security concerns relating to the B-2 program. Consequently, the district court concluded that there was no genuine issue of material fact as to whether Hughes had submitted a false claim.

On appeal, Schumer challenges the district court's grant of summary judgment on the merits and also contends that the district court erred by refusing to reopen discovery, grant him leave to amend, and return the case to the jury docket. In a

cross-appeal, Hughes asserts that the 1986 amendments to the False Claims Act do not apply retrospectively, and that the court therefore must dismiss the action under the pre-1986 statute, which contained a jurisdictional bar that precluded the court from hearing a *qui tam* action when the government had knowledge of the relator's allegations prior to the filing of the suit. Alternatively, Hughes argues that the district court improperly failed to dismiss the case for lack of subject matter jurisdiction because the complaint was "based upon the public disclosure of allegations," a condition under which the court's jurisdiction is barred by the 1986 amendments to the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). Finally, Hughes contends that *qui tam* actions are inherently unconstitutional and requests attorneys' fees on the ground that the appeal is frivolous.

DISCUSSION

I. Retrospectivity of the Jurisdictional Bar

Because the 1986 amendments to the False Claims Act altered subject matter jurisdiction rules, we must first address whether the jurisdictional amendment applies retrospectively in order to determine whether the district court had subject matter jurisdiction. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992). Since this is an issue of statutory interpretation, we review it de novo. *Braun v. INS*, 992 F.2d 1016, 1018 (9th Cir. 1993).

Whereas the pre-1986 Act barred cases brought by *qui tam* plaintiffs when their allegations were "based on evidence or information the Government had when the action was brought," 31 U.S.C. § 3730(b)(4) (1982), the 1986 amendments narrowed this bar to the more limited class of cases based on information previously disclosed to the public, 31 U.S.C. § 3730(e)(4). Specifically, Hughes argues that the more restrictive rules of

the pre-1986 Act should apply because Schumer's allegations involve cost allocations primarily made prior to 1986. Since the government was aware of Schumer's allegations before he filed his suit, the pre-1986 rules would bar his claim.[1] We reject this argument because the jurisdictional bar of § 3730(e)(4) applies retrospectively and therefore controls this case.

The first step of retrospectivity analysis is to consider whether Congress has demonstrated in the statute itself or in its legislative history an intent for the statute to apply retrospectively. *Landgraf v. USI Film Products*, ___ U.S. ___, ___, 114 S.Ct. 1483, 1500 (1994). If so, the statute should be construed in accordance with that congressional intent. Here, however, Congress did not demonstrate an intent that the FCA should apply retrospectively. *See United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991); *United States ex rel. McCoy v. California Medical Review, Inc.*, 723 F.Supp. 1363, 1368 (N.D.Cal.1989).

Absent such a demonstration, we presume that a statute altering substantive rights applies only prospectively. *See Landgraf*, ___ U.S. at ___, 114 S.Ct. at 1500. The *Landgraf* Court, however, carved out an exception to that rule in the case of jurisdictional statutes. The Court applied a strong presumption that jurisdictional statutes apply retrospectively, for such statutes ordinarily "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, ___ U.S.

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[1] Because the government allegedly became aware of the allegations through the 1986 government audit, which pre-dated the 1986 amendments, this case differs from *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995), in which we declined to consider the retroactivity of the jurisdictional bar because the relator's disclosure to the government occurred after 1986. *Id.* at 814-15.

at ___, 114 S.Ct. at 1501 (quoting *Republic National Bank of Miami v. United States*, ___ U.S. ___, ___, 113 S.Ct. 554, 565 (1992) (Thomas, J., concurring)). Because the 1986 amendment explicitly effects a jurisdictional bar, *see* 31 U.S.C. § 3730(e)(4) ("No court shall have jurisdiction ..."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992), we presume that it applies to the present action.

Rebuttal of this presumption would require some indication that the jurisdictional rule curtailed a substantive right, by "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed." *See Landgraf*, ___ U.S. at ___, ___, 114 S.Ct. at 1502, 1505. However, we recently held that the 1986 jurisdictional bar does not have such a deleterious effect on substantive rights. *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995). In *Lindenthal*, we concluded that the jurisdictional bar "did not alter [the defendant's] underlying liability; it only altered the conditions under which a qui tam relator can bring an action to enforce that liability." *Id.*; *see also United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995) (stating that the 1986 amendments "did not change the legal consequences of the [defendant's conduct]"); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F.Supp. 1351, 1362 (D.Mass.1988). Because the amendment does not infringe on the substantive rights of the defendant, it does not rebut the presumption of retrospective application of jurisdictional provisions. *See Lindenthal*, 61 F.3d at 1408-09. Accordingly, we apply the 1986 jurisdictional provision retrospectively to this case. *See id.*

II. Subject Matter Jurisdiction

Under the 1986 jurisdictional provisions of the False Claims Act, a *qui tam* action is barred if it is "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, of from the news media, unless ... the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). In its cross- appeal, Hughes alleges that Schumer's action is barred because it is based upon unclassified government audits which have been disclosed publicly.

We review the question of whether the district court had subject matter jurisdiction de novo. *Nike, Inc. v. Comercial Iberica De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994). We hold that Schumer's allegations were not publicly disclosed and therefore that the district court properly exercised jurisdiction.

Claiming that Schumer's allegations are based upon charges made by certain government audit reports, Hughes contends that these audits effectively had been disclosed to the public prior to the filing of Schumer's suit as a result of (1) disclosure of the audits' allegations to "innocent" Hughes employees; and (2) the availability of the audits through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. We reject both arguments.

A. Disclosure to Employees

Hughes argues that the dissemination of government audits to employees of Hughes and Northrop who were not involved in the alleged fraud constituted public disclosure. Hughes relies on *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992), in which the Second Circuit held that

public disclosure occurred when federal investigators arrived at the defendant company's offices with a search warrant and informed employees on site that they were investigating allegations of fraudulent overcharging under defense contracts. *See id.* at 319-20. Rejecting the argument that disclosure had not occurred because the information was disseminated to a limited number of persons, the court stated that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations." *Id.* at 323.

We decline to adopt the rule of *Doe* for application in this circuit. At one level, the *Doe* court's treatment of company employees as members of the public is unrealistic. Unlike others who come across information related to fraud, an "innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy." *Doe*, 960 F.2d at 325 (Walker, J., dissenting). Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure. Because disclosure of such allegations could reflect negatively on both Northrop and Hughes, this reasoning applies to employees of both companies.

Indeed, this circuit has indicated that disclosure by one government employee to another would not constitute public disclosure. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). Yet in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy. We see no principled distinction between disclosures to other government employees and to employees of defense contractors and sub-

contractors. Both situations involve the release of information within a private sphere. Under a "practical, commonsense interpretation" of the jurisdictional provisions, information that was "disclosed in private" has not been publicly disclosed. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991).

Moreover, by treating employees of the defendant company as "members of the public" to whom "public disclosure" can occur, *Doe*, 960 F.2d at 323, the *Doe* court ignored one of the stated purposes of the 1986 amendments to the False Claims Act. As this circuit has noted, the 1986 amendments were adopted in part to correct a restrictive interpretation of the Act which barred *qui tam* suits whenever "the government already possessed the information" upon which the lawsuit was based. *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) (citing S.Rep. No. 345, 99th Cong., 2d Sess. 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269). The *Doe* rule would run contrary to this purpose, for it drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter. If revelation to employees at this stage would constitute public disclosure, any employee who receives word of government allegations would be barred from bringing suit. Contrary to Congress's intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits. *Doe*, 960 F.2d at 326 (Walker, J., dissenting).

Such a restrictive interpretation necessarily requires greater reliance on government action. Yet in passing the 1986 amendments, Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of

the government." *Doe*, 960 F.2d at 323; S.Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91 [hereinafter Senate Report]. The 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct. *See* Senate Report, *supra*, at 2. Thus, we reject the *Doe* court's definition of "public disclosure," which forecloses many insiders from bringing *qui tam* actions, as contrary to the intent of the statute.

Although Hughes raises the concern that our rule would open the floodgates to parasitic *qui tam* actions whenever the government audits a company, any such effect would be limited to a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit. *See United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157-58 (2d Cir.) (noting that the statute seeks to bar parasitic lawsuits), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2962 (1993). With this concern offset by Congress's desire to avoid total reliance on government enforcement, we hold that disclosure to company employees does not constitute public disclosure.

B. Disclosure through the FOIA

Although Hughes does not dispute that certain classified reports underlying Schumer's claims were not available to the public, Hughes argues that three unclassified government audits by the Defense Contract Audit Agency ("DCAA") were publicly disclosed because they were potentially available to any member of the public who filed a request for release of the audits under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Hughes argues that because the regulations provide that "[r]ecords not specifically exempt from disclosure under the [FOIA] shall, upon request, be made accessible to the

public," 32 C.F.R. § 286.7(b), unclassified documents are necessarily publicly disclosed.

Hughes relies on an analogy to precedent holding that allegations made available through the discovery process are deemed publicly disclosed. *See Kreindler*, 985 F.2d at 1158 (holding that discovery material contained in unsealed court records was "publicly disclosed"); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991). In *Stinson*, the Third Circuit held that because the FCA seeks "to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it," *id.* at 1155-56, "the disclosure of discovery material to a party who is not under any court imposed limitation as to its use is a public disclosure under the FCA." *Id.* at 1158. This rule applies regardless of whether the discovery material actually has been filed with the court. *Id.*

By contrast, the District of Columbia Circuit in *United States ex rel. Springfield Terminal Ry. Co.*, 14 F.3d 645 (D.C.Cir. 1994), rejected the view that a discovery document turned over to another party to the litigation, but not actually filed with the court, should be deemed publicly disclosed. *Springfield Terminal* concluded that only discovery material "actually made public through filing" was disclosed. It concluded that discovery material exchanged by parties but not filed with the court "is only *theoretically* available upon the public's request." *Id.* at 652 (emphasis in original).

We conclude that the District of Columbia Circuit's distinction between *actual* and *theoretical* availability is persuasive, and we reject the rationale of *Stinson* to the extent that it comes to an opposite conclusion. The distinction between *actual* and *theoretical* disclosure is particularly instructive on the question of whether the DCAA audits in this

case were publicly disclosed because of potential availability under the FOIA. Although a document on file with the court may be examined by any member of the public upon a request to the clerk and thus can fairly be deemed actually available, a document held by the government and subject to public inspection only after all FOIA conditions have been satisfied is far less accessible to the public.

Although Schumer eventually filed a successful FOIA for copies of the audits, he filed his suit prior to any request for or release of the audits. In the FOIA context, information cannot be deemed disclosed until a member of the public requests the information *and receives it* from the government. Only then is the information *actually*, rather than *theoretically* or *potentially*, available to the public. Because the audits were not actually available prior to Schumer's suit, we find that they were not actually disclosed.

Our view finds support in the Supreme Court's conclusion that the FOIA requirements "relate[ ] to disclosure *initiated by a specific request* from a member of the public." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting H.R.Conf.Rep. No. 94-1022, 94th Cong., 2d Sess. 27 (1976)) (emphasis added). Although the Court stated that disclosures through the FOIA are public disclosures within the meaning of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), it specifically referred to such disclosures as "the disclosure of information *in response to* an FOIA request." *Id.* at 109 (emphasis added). Even in *Stinson*, the court noted that "public disclosure" should be given a "practical, commonsense interpretation" such that information "hidden in files" would not be public. *Stinson*, 944 F.2d at 1161.

Moreover, a definitive assessment of whether government information is exempt from disclosure under one of the enumerated FOIA exceptions does not occur until *after* a

request has been made for the release of the information. *See* 32 C.F.R. § 286.16(d). The Defense Department's regulations specifically require that once a FOIA request for the document has been made, there must be an "examination for the presence of information that requires continued protection" such that "under the current circumstances, FOIA exemptions apply." *Id.* § 286.16(b), (d). Even documents that were not previously marked "For Official Use Only," which normally indicates that a FOIA exemption applies, "shall not be assumed to be releasable" without such an examination. *Id.* 286.16(d). Because the final assessment of whether the audits could be exempt from the FOIA would not take place until after a formal request for their release, they cannot be deemed to have been publicly disclosed prior to such a request.

Because we find that there was no public disclosure of the government audits, we need not address whether Schumer's claims were "based upon" those audits, or whether Schumer was an "original source" of the allegations. *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992).

III. Constitutionality

Hughes argues that the *qui tam* provisions are unconstitutional because they violate the Article III standing requirement, the doctrine of separation of powers, and the Appointment Clause's limitation on who may conduct litigation on behalf of the United States. This circuit previously has addressed and rejected these exact arguments. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993); *see also Kreindler*, 985 F.2d at 1153-55 (holding that the *qui tam* provisions are constitutional). Accordingly, we deny Hughes's cross-appeal and consider the merits of Schumer's claims.

IV. Summary Judgment

Schumer bases his *qui tam* action on several claims. Specifically, he argues that (1) Hughes improperly charged the development costs of "gate array" technology for the Analog Signal Converter ("ASC") to the B-2 contract; (2) Hughes failed to disclose to Northrop the commonality agreement relating to the Radar Digital Processor ("RDP"); and (3) the agreements violated the Cost Accounting Standards ("CAS").

We review the district court's grant of summary judgment on these issues de novo. *Jesinger v. Nevada Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Viewing the evidence in the light most favorable to Schumer, we consider whether there are any genuine issues of material fact. *Id.*

A. Charging of Gate Array Development Costs to the B-2 Subcontract

In asserting that Hughes mischarged costs to the B-2 program that should have been charged to the F-15 program, Schumer focuses on the charging of the development costs of "gate array" microcircuitry for use in the ASC component of the B-2 and F-15 radar systems. Schumer alleges that Hughes violated the False Claims Act by charging for costs that are "unallowable." If Hughes knowingly made unallowable charges to the B-2 account, the FCA would be implicated. *See* 10 U.S.C. § 2324(i).[2]

Schumer argues that costs allocated to the B-2 subcontract were unallowable pursuant to the contract between Northrop

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[2] Section 2324(i) provides that: The submission to the Department of Defense of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of ... [the False Claims Act].

and Hughes. *See* 48 C.F.R. § 31.201-2(a) (noting that determination of allowability involves consideration of "terms of contract").[3] First, he argues that the pricing of the B-2 subcontract was premised on the use of existing radar modules, so the pricing and cost accumulation for radar modules could not deviate from the original understanding. Any change affecting costs, such as the development of gate array technology, would require a "change proposal" before such costs could be allowable.

The district court properly found that the B-2 subcontract agreement did not require the use of any particular radar module. Furthermore, the subcontract's language that "the ATB air vehicle components and subsystems will undergo technical definition, design, layouts, trade studies, and development process in order to define the required weapon system" indicates that the contract contemplated the possibility of development costs arising from a new design of the radar subsystem. Indeed, four Hughes witnesses testified in depositions that the parties believed that the contract merely laid out performance specifications and left the matter of design to Hughes. For example, David D. Lynch, Jr., a Hughes vice president, stated, "It was understood by Hughes, Northrop, and the Air Force that the design of the radar would not be fixed at the outset ... the design of the radar was entirely the prerogative and responsibility of Hughes."

Schumer failed to provide any contrary testimony to challenge this interpretation. The only relevant evidence that

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[3] 48 C.F.R. § 31.201-2(a) provides that: The factors to be considered in determining whether a cost is allowable include the following: (1) Reasonableness. (2) Allocability. (3) Standards promulgated by the CAS Board, if applicable ... (4) Terms of the contract. (5) Any limitations set forth in this subpart.

he points to with respect to this issue is testimony asserting that Northrop and the Air Force had to agree to the particular hardware configuration. Yet Schumer has failed to provide evidence to offset Hughes's assertion that all relevant parties agreed to the use of the gate array technology in order to satisfy the technical requirements of the B-2 project. Several witnesses testified that the Air Force and Northrop determined in 1982 that weight reduction would be necessary to satisfy the B-2's mission profile. As a consequence, Hughes began to develop a lighter radar module that depended on gate array technology. Significantly, Lynch testified that Hughes presented the gate array design to Northrop and the Air Force in 1982 and notified Northrop of the specific details of the design in 1983. Because Schumer has not provided evidence to contradict Hughes's assertions, he has failed to raise a genuine issue of material fact as to whether the contract permitted the use of the gate array technology. *See* Fed.R.Civ.P. 56(e) (requiring the adverse party to provide "specific facts" to show a genuine issue of material fact); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Therefore, we affirm the grant of summary judgment on this claim.

Second, Schumer argues that since the gate array technology was approved for use in the F-15 *before* approval for use in the B-2, Northrop implicitly conditioned its approval of gate array for the B-2 implicitly on the requirement that the F-15 account bear all the development costs. However, Schumer presents no evidence to controvert the report of the Defense Logistic Agency's Administrative Contracting Officer that "the requirements for the gate array upgraded Analog Signal Converter existed on the B-2 program *prior* to the award for the F-15 MSIP contract." In addition, a report of the Air Force's chief engineer stated that, "[t]he initial design effort using gate array technology was started on the B-2 Program in March 1982 to meet technical requirements of the B-2 radar." More-

over, Schumer did not controvert the evidence that McDonnell Douglas, the prime contractor for the F-15 project, did not approve the use of the gate array ASC for that aircraft until 1984, two years after Hughes began designs for gate array for the B-2 project.

Schumer cites documents, credited by the district court, that demonstrate the incorporation of gate array ASC into design studies for the F-15 MSIP as early as August 1982, and reveal that the designs were absent from some diagrams of the B-2's radar from late 1982 and early 1983. However, these shed no light on whether *approval* of the use of gate array technology in the F-15 MSIP occurred before or after approval of its use on the B-2. Indeed, Schumer's reference to proposals for and contemplation of "commonality efforts" involving the F-15 in 1983 is entirely consistent with Hughes's evidence of prior approval of the development of gate array ASC for the B-2 program. Without evidence of prior approval of gate array technology for the F-15 program, Schumer's claim that the parties in the B-2 project understood all development costs to be attributable to the F-15 program cannot survive summary judgment.

The remaining arguments arising from the charging of ASC costs to the B-2 program similarly lack merit. Schumer asserts that, as part of its formal proposal for the F-15 contract, Hughes certified that no accumulated hours of labor had been recorded for work on gate array technology. Although Schumer argues that this indicates that the use of gate array technology on the B-2 had not commenced before work on the F-15, any inference that might be drawn from this fact is negated by the Air Force chief engineer's report, which stated that the "classified nature of the B-2 program precluded Hughes from discussing any aspect of the B-2 program with any other Hughes' customers ... [and] this prevented Hughes

from disclosing full details regarding commonality in its pricing of the F-15 MSIP and F-14D programs." Schumer has failed to dispute this explanation.

Finally, Schumer asserts that the absence of evidence that Hughes ever sought "military qualification" for gate array technology for use with the B-2 program indicates that charges to that program were not allowable. However, Air Force technical advisor Ronald Longbrake testified that "one gate array had been fully qualified in 1983 for military application and another one was nearing completion of military qualification." We find insufficient evidence to create an issue of material fact. *Celotex*, 477 U.S. at 324. Accordingly, we affirm the district court's grant of summary judgment on Schumer's claim that ASC costs charged to the B-2 program were not allowable.

B. Disclosure of RDP Commonality Agreements

Because the RDP was used in both the F-15 and the B-2, Hughes established a commonality agreement to govern allocation of costs between the two accounts by which "development costs" would be charged only to the F-15, and other costs would be split between the programs. Schumer contends that until 1984, Hughes did not disclose adequately to Northrop's subcontracts manager the specific formula for cost allocation, including what Schumer calls the "arbitrary baseline" for determining which costs would be classified as "development" costs. Schumer argues that this failure caused Northrop to be misled as to the costs to the B-2 program, thus creating a substantial issue as to the reasonableness of allowing the RDP charges. *See* 48 C.F.R. § 31.201-2(a)(1) (stating that "reasonableness" of charges is a factor in determining allowability); *see supra* note 2.

Hughes provides evidence that on December 7, 1982, Hughes informed Northrop of the commonality agreement and the definition of the development stage. The commonality agreement itself, dated December 14, 1982, articulated a baseline between development and production costs that closed development at the point known as "production drawing release." Furthermore, on January 23, 1983, Hughes disclosed the agreement to Northrop's radar manager, Robert Davis, who testified that he understood the meaning of the baseline. Both the Air Force and Northrop subsequently approved the use of the F-15's RDP based in part on the disclosure of the commonality agreement.

Schumer counters this evidence by noting that Northrop's "cognizant contracting officer," Robert Blakeney, denied having learned of the commonality agreement. Blakeney also drafted a white paper in 1986 which stated that the December 1982 disclosure, although outlining the commonality arrangement, was made "with no technical, schedule or cost impact attendant thereto." This white paper noted that although the use of the RDP for both programs was approved in January 1983, the commonality agreement that "defined the shared funding responsibilities" was developed, approved, and "unilaterally implemented with no customer participation."

This evidence, taken together, raises a genuine issue of material fact as to whether Hughes had disclosed sufficiently the terms of the commonality agreement to Northrop, particularly the manner in which the development costs, covered solely by the F-15 program, would be defined. Although the white paper does not contradict the existence and approval of a commonality agreement to use the RDP for both programs, it indicates that Northrop may not have received adequate information on specific cost impacts under the scheme. Significantly, Davis, the witness upon whose deposition testimony

Hughes relies to show disclosure to Northrop, was a signatory to the white paper and its claim that the proposal approved in 1983 lacked any cost impact analysis. Although the white paper could be construed as consistent with Davis's deposition testimony that he understood the commonality agreement's baseline for development costs, we must view the evidence in the light most favorable to Schumer. *See Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989). Because a factfinder could choose to credit the conclusions reached in the white paper signed by Davis, rather than Davis's deposition testimony, we find that Schumer created a genuine issue of material fact as to whether Hughes's efforts at disclosure were sufficient.[4]

Schumer also argues that the baseline itself is inherently arbitrary and contrary to military standards. He claims that several applicable factors should have been applied to define the time at which the design and development stage moves to the production stage. However, Schumer provides no authority for this claim, nor does he demonstrate that the baseline selected was inconsistent with these other factors. Moreover, Davis's statement that the baseline was the one "usually and

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[4] Schumer also claims that any disclosure to Davis, the radar manager, was insufficient because only evidence of specific approval by Blakeney, the contracting officer, would defeat his claim. We decline to rule on this basis because Schumer provides no evidence to indicate that Davis, who was the Northrop representative with whom Hughes consulted on a regular basis, lacked the authority to grant any approval required by the contract or by law. In fact, Schumer concedes that the subcontract did not require the filing of a formal "change proposal" for the RDP commonality agreement, subject to formal approval by Northrop. In addition, we find that Schumer waived his claim under the Truth in Negotiations Act, 10 U.S.C. § 2306a, because he did not argue that claim in his opening brief. *See All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1434 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1301 (1994).

generally agreed upon" indicates that Northrop had approved the use of such a baseline in the past. This particular argument fails to raise an issue of material fact.

Nevertheless, we reverse the district court's grant of summary judgment on the claim that Hughes failed to disclose adequately to Northrop the terms of the RDP commonality agreement.

C. Compliance with the CAS

Schumer further alleges that Hughes violated the FCA by failing to comply with the CAS that were incorporated in the B-2 and F-15 subcontracts. First, he argues that Hughes violated a CAS prohibition on pooling of direct costs. 48 C.F.R. § 9904.402-30. Second, Schumer asserts that Hughes's practices did not conform to CAS § 401, which requires that "a contractor's practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs." 48 C.F.R. § 9904.401-40(a). Third, he argues that Hughes failed to comply with CAS disclosure statement requirements because it did not properly disclose its cost allocation practices in the filed statement. 48 C.F.R. § 9903- 202. Since a contractor's compliance with the Cost Accounting Standards is relevant to the determination of whether the costs it claims to have incurred are allowable, 48 C.F.R. § 31.201-2(a)(3); *see supra* note 2, and unallowable costs can trigger the False Claims Act, see 10 U.S.C. § 2324(i); *see supra* note 1, Schumer contends that evidence of noncompliance with the CAS should preclude summary judgment.

Although Schumer did not allege these claims in his complaint, we consider them because when a party raises a claim in materials filed in opposition to a motion for summary judgment, the district court should treat the filing as a request

to amend the pleadings and should consider whether the evidence presented creates a triable issue of material fact. *See Apache Survival Coalition v. United States*, 21 F.3d 895, 910-11 (9th Cir. 1994); *Johnson v. Mateer*, 625 F.2d 240, 242 (9th Cir. 1980); *see also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1052- 54 & n. 68 (9th Cir. 1981) (holding that district court properly considered on summary judgment an antitrust plaintiff's vertical conspiracy claim that had not been raised in the complaint), *cert. denied*, 459 U.S. 825 (1982). On remand, the complaint should be considered so amended.

On the merits, Schumer first argues that the costs of producing the radar components for the B-2 and F-15 were "direct costs" and therefore could not be "pooled" in a commonality agreement. However, Schumer fails to cite any portion of the regulations that prohibits pooling of direct costs. Instead, he argues that the existence of a definition for "indirect cost pool," but not for a direct cost pool, implies such a prohibition. *See* 48 C.F.R. § 9904.402-30. We reject Schumer's claim because he has presented no genuine issue of material fact on this claim.

A direct cost is one "identified specifically with a particular final cost objective." *Id.* § 9904.402-30(a)(3). An indirect cost is "any cost not directly identified with a single final cost objective, *but identified with two or more final cost objectives or with at least one intermediate cost objective*." *Id.* 9904.402-30(a)(6) (emphasis added). As noted by the regulations, many types of costs can be classified as either direct or indirect. *See* 48 C.F.R. § 9904.402-50. For example, certain travel costs, planning costs, general tooling costs, and costs of employees engaged to perform duties that benefit several contracts can be treated as either direct or indirect, depending on the circumstances. *See* 48 C.F.R. § 9904.402.60. Beyond

his mere allegations, Schumer has provided no evidence to indicate that Hughes has improperly classified as indirect costs any specific costs that the regulations only permit to be treated as direct costs.

Moreover, Schumer's claim that the commonality agreements constituted impermissible "pooling" of direct costs lacks substantiation. Whereas Schumer focuses on direct labor costs as impermissibly pooled, he has not provided evidence to show that such costs were grouped into any pooling arrangement prohibited by the regulations.[5] The fact that Hughes's commonality agreements discuss allocation of direct labor costs would only constitute improper pooling if they set forth an improper method of allocation. However, Schumer has not shown this to be the case. The regulations specifically provide that when direct labor and material costs benefit more than one contract, they often may be allocated according to pre-established measures that estimate the benefits provided to the specific contracts. *See* 48 C.F.R. § 9904.407. Hughes's commonality agreements that discuss direct labor costs indicate in general terms that such costs are to be allocated to contracts based upon various estimates of benefit to those accounts, such as the number of modules ordered by each program in a given year. Schumer has provided no evidence to show that such direct labor costs are charged on some basis other than a mea-

[5] The only requirements regarding direct and indirect costs explicitly stated in the cited section of the regulations are that contractors must (1) file disclosure statements that set forth their accounting practices and the bases upon which they have made classifications of costs as direct or indirect; (2) treat costs consistently as either direct or indirect across contracts; and (3) amend the disclosure statement if they make any changes in practices. *See* 48 C.F.R. § 9904.402-40, -50. Although the regulations require that direct costs be allocated to the contracts which they benefit, *see id.* § 9904.418, they do not expressly prohibit pooling of direct costs.

sure of the actual work performed for the benefit of a given contract, nor has he shown that any of the commonality agreements' statements on how such benefits were to be calculated applied an impermissible estimate. Absent evidence to show such a violation, we find no genuine issue of material fact on Schumer's claim regarding direct cost pooling.

On Schumer's other CAS claims, the evidence indicates that there is no genuine issue of material fact on whether Hughes's practices violated CAS § 401. Contrary to Schumer's assertion, the audit report specifically states that Hughes's "bidding and accumulating of costs was in compliance with CAS § 401." However, the audit report did indicate that for the period from December 1982 to January 1984, Hughes violated the CAS by failing to state accurately in its disclosure statement its practice of accumulating costs at a more detailed level than in its bidding estimates. *See General Motors Corp. v. Aspin*, 24 F.3d 1376, 1382-83 (Fed.Cir. 1994) (noting that disclosure statements must accurately describe the accounting methods used). This noncompliance with the CAS may have rendered the costs unallowable under 48 C.F.R. § 31.201-2(a)(3), which requires that "[s]tandards promulgated by the CAS" be considered in determining allowability of costs. *Id.*

Although the Administrative Contracting Officer found that this noncompliance had an "immaterial impact" on costs, the lack of a determination of actual harm from the CAS violation does not preclude a claim under the FCA. *See, e.g., Rex Trailer Co. v. United States*, 350 U.S. 148, 152, 76 S.Ct. 219, 222, 100 L.Ed. 149 (1956); *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D.Pa.1991) (citing cases). Because the audit found that Hughes's disclosure statement improperly failed to reflect the impact of the commonality agreements, we hold that this violation of the CAS creates a

genuine issue of material fact relating to a violation of the False Claims Act. Accordingly, we reverse the district court's grant of summary judgment on this issue.

V. Motion to Reopen Discovery

In April 1992, after the summary judgment motion had been argued, Schumer moved to reopen discovery based on a story in the *Los Angeles Times* that described allegations filed in a *qui tam* case by another former Hughes employee, Linda Lujan, similarly alleging that "Hughes had inflated the cost of the B-2's radar by billing expenses to it from other defense programs." The story disclosed that Hughes's former "ethics boss," Tom Pierce, had left Hughes because of an inability to obtain "satisfactory answers" concerning Lujan's allegations, and it discussed a December 1988 audit that apparently concluded that Hughes had mischarged $70,000 to the B-2 subcontract.

The article also referred to Pierce's replacement, Joseph Savroni, whom Schumer maintains wrote a note for Lujan's file to the effect that her alleged discoveries might get the Department of Defense "involved [through] the back door via her lawyer and eventually threaten our commonality system for some charges." Schumer argues that the district court should have granted his motion to reopen discovery for the "limited purpose" of deposing Pierce and Savroni and obtaining access to the audit mentioned in the report and any other relevant reports.

Denial of a motion to reopen discovery is reviewed for "a clear abuse of discretion." *United States ex rel. Army Athletic Ass'n v. Reliance Ins. Co.*, 799 F.2d 1382, 1387 (9th Cir. 1986) (quoting *Foster v. Arcata Assocs.*, 772 F.2d 1453, 1467 (9th Cir. 1985)). In applying this standard, courts consider such factors as:

> 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.

Smith v. United States, 834 F.2d 166, 169 (10th Cir. 1987).

Applying these criteria, we hold that the district court did not abuse its discretion in denying the motion. Although Schumer was reasonably diligent in pursuing discovery prior to this request, it cannot be said that the need for the information sought could not have been foreseen prior to the publication of the newspaper article. Since Schumer's charges centered around ethical violations relating to the commonality agreements, he could have sought the files of the Ethics Department relating to B-2 accounts, as well as the deposition of Pierce, during the original discovery period. The claim that Schumer only recently learned of these sources, through the newspaper article, does not necessarily justify additional time for discovery. *Cf. Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990) (denying motion to reopen discovery despite claim that plaintiffs only recently learned of a new basis for the claim).

Moreover, it is unclear whether additional discovery is likely to "lead to relevant evidence." *Smith*, 834 F.2d at 169. Schumer's allegations focus on legal violations in the construction of the commonality agreements and Hughes's failure to disclose the arrangements to Northrop and the government. By contrast, the audit sought in this case appears to address whether there was mischarging under the guidelines set by the commonality agreements, not whether the agreements them-

selves were improperly established. Indeed, Schumer alleges that he had personal knowledge only of Hughes's intent to enter into commonality agreements without full disclosure, not of specific mischarging.

In addition, testimony by Savroni, who succeeded Pierce as ethics chief in 1989, is unlikely to lead to relevant evidence on whether the commonality agreements, conceived in the early 1980s, were properly established. *Cf. Reliance*, 799 F.2d at 1388 (noting that it was "unlikely" that the requested depositions would lead to the development of any relevant evidence). Therefore, Schumer can "only speculate[ ] as to what evidence, if any, further discovery would produce." *Gray v. Town of Darien*, 927 F.2d 69, 74 (2d Cir.), *cert. denied*, 502 U.S. 856 (1990). Especially when this circuit has held that a district court "has wide latitude in controlling discovery," *Reliance*, 799 F.2d at 1387 (quoting *Foster*, 772 F.2d at 1467), we find that the district court did not abuse its discretion in denying the motion to reopen discovery.

VI. Leave to Amend

In January 1992, Appellant moved to amend his complaint to include claims under the "whistleblower" provision of the False Claims Act, 31 U.S.C. § 3730(h), and a similar state law provision, Cal.Gov't Code § 12653, both of which give a civil cause of action to employees who were discriminated against by employers for pursuing *qui tam* actions. Schumer argues that the district court abused its discretion in declining to permit the amendment because it "would have served judicial economy" since the claims "clearly arose from the same nucleus of fact." We reject this argument and affirm the district court's ruling.

Failure to permit leave to amend is reviewed for abuse of discretion. *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th

Cir. 1991). In assessing the propriety of a motion for leave to amend, we consider factors such as "bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

The circumstances surrounding the motion for leave to amend demonstrate that the motion was made after undue delay. Although Schumer knew all of the facts relevant to the "whistleblower" claim when the complaint was filed on January 23, 1989, he did not move to amend until three years later. The existence of undue delay supports denial of a motion for leave to amend. *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991) (denying leave to amend after two year delay); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Moreover, permitting the amendment would have required Hughes to address new legal theories and would have required extensive additional discovery, all of which would have been prejudicial. *See Texaco*, 939 F.2d at 798-99. Finally, Schumer had already amended the complaint once before this motion was filed. *See Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) (holding that the district court's discretion is especially broad when the court has previously given the plaintiff an opportunity to amend). Thus, although we are aware that "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality'," *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981), we cannot conclude under the circumstances present here that the district court abused its discretion in denying Schumer's motion for leave to amend.

VII. Jury Trial

Finally, Schumer claims that the district court improperly found that he had waived his right to a jury trial, or alternatively, that the district court abused its discretion in

refusing to reinstate the action on the jury docket pursuant to Rule 39. *See* Fed.R.Civ.P. 39(b). We reject both contentions.

Schumer does not contest that the statements and actions of his prior counsel would have constituted a valid waiver if he had been properly informed of them. Instead, Schumer contends that because his attorney "actively misled" him, his counsel's statements and actions regarding the jury demand are not binding. Thus, he argues that his counsel's actions do not constitute a knowing and voluntary waiver of his (Schumer's) constitutional right to a jury trial.

We need not decide whether a party may challenge a waiver entered by his counsel on the grounds raised by Schumer. In this case, Schumer's new counsel was aware of the previous counsel's waiver well before the validity of that waiver was challenged. Instead of challenging the waiver or moving to have the case returned to the jury docket, Schumer's new counsel participated voluntarily in proceedings designed to further a bench trial.[6] Because Schumer's attempts to disassociate himself from the waiver by his former counsel were not asserted below in a timely waiver, we affirm the district court's conclusion that the jury demand was waived.

Although we conclude that Schumer waived his right to a jury trial, we must also address his contention that the district court abused its discretion in denying his motion to reinstate the action on the jury docket. *See* Fed.R.Civ.P. 39(b); *see also Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987 (9th Cir.

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[6] We need only mention one instance to demonstrate that the issue was not raised in a timely fashion. New counsel was appointed in September 1991. In January 1992, the court clerk announced, at the conclusion of a motions hearing, that a date had been set for a *non-jury* trial. Schumer's new counsel made no objection either to the date or to the manner in which the trial would be conducted.

1980) (holding that denials of Rule 39 motions are reviewed for abuse of discretion). Given Schumer's failure to raise the issue of his counsel's deception in a timely manner, we conclude that the district court did not abuse its discretion in denying the motion. Accordingly, we affirm.

CONCLUSION

For the reasons stated, we hold that the 1986 jurisdictional bar to the False Claims Act, which applies retrospectively, does not prevent subject matter jurisdiction in this case because there was no "public disclosure" of Schumer's allegations. On the merits, we reverse the district court's grant of summary judgment on the claims of failure to disclose the commonality agreements to Northrop and failure to comply with the Cost Accounting Standards' disclosure requirements,[7] but affirm the court's grant of summary judgment on the remaining claims. We also affirm the district court's denial of Schumer's motions to reopen discovery, for leave to amend the complaint, and to return the case to the jury docket. Each party shall bear its own costs.

Affirmed in part; Reversed in part; and Remanded.

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[7] Because we reverse and remand on these claims, we decline to reach Hughes's claim for attorneys' fees.

APPENDIX B

[Filed November 17, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-55759, 92-55857
DC No. CV-89-0390-MRP

United States of America, *ex rel.*, William J. Schumer,

Plaintiff-Appellant/Cross-Appellee,

v.

Hughes Aircraft Company,

Defendant-Appellee/Cross-Appellant.

ORDER

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judges

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Reinhardt and Brunetti voted to reject the suggestion for rehearing en banc and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

[Filed November 1, 1990]

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

CV-89-0390-MRP

United States of America *ex rel* William J. Schumer,

Plaintiff,

v.

Hughes Aircraft Company,

Defendant.

ORDER

The Motion to Dismiss and the Motion for Summary Judgment by Defendant, and the Motion for Partial Summary Judgment and the Motion to Defer Consideration of Motion for Summary Judgment by Plaintiff, came regularly for hearing on October 29, 1990, Dean Francis Pace Esquire appearing for Plaintiff and James J. Gallagher Esquire appearing for Defendant. The Court having considered the briefs, affidavits and the argument by Counsel, and good cause not appearing, now therefore

IT IS ORDERED:

(1) The Motion to Dismiss by Defendant be and it is hereby denied;

(2) The Motion for Summary Judgment by Defendant be and it is hereby denied;

(3) The Motion for Partial Summary Judgment by Plaintiff be and it is hereby denied;

(4) The Motion to Defer Consideration of the Motion for Summary Judgment by Plaintiff be and it is hereby denied.

Dated: November 1, 1990

/s/ Mariana R. Pfaelzer
UNITED STATES DISTRICT JUDGE

Submitted By:

PACE QUINN AND ROSE

By /s/ Dean Francis Pace
Dean Francis Pace
Attorney for Plaintiff

Approved As To Form:

MCKENNA AND CUNEO

By /s/ Mark R. Troy
James J. Gallagher
Attorneys for Defendant

APPENDIX D

[Filed May 20, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 89-390 MRP

United States of America, *ex rel.*, William J. Schumer,

Plaintiff,

v.

Hughes Aircraft Company,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

The Motion of Defendant Hughes Aircraft Company ("Hughes") for Summary Judgment came on regularly for hearing on March 23, 1992 before this Court. The Court having considered the pleadings, papers, and the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Hughes' Motion for Summary Judgment is granted.

DATED: May 19, 1992

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX E

[Filed May 20, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 89-390 MRP

United States of America, *ex rel.*, William J. Schumer,

Plaintiff,

v.

Hughes Aircraft Company,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court enters the following Findings of Fact and Conclusions of Law in conjunction with the Order Granting Hughes Aircraft Company's Motion for Summary Judgment entered concurrently herewith.

I. FINDINGS OF FACT

A. Commonality and Commonality Agreements

1. When Hughes designs, develops or manufactures radar parts for use in several different radar subcontracts, the costs of such design and development must be tracked and accounted for. Since 1978, Hughes has accounted for such costs by allocating them among the different subcontracts that utilize the

common parts to ensure that each subcontract incurs its fair share of the costs.

2. The common tasks, accounting controls and cost sharing arrangements are established by Hughes' program managers responsible for each of the different radar programs and Hughes' finance and accounting personnel and are set forth in Hughes' Commonality Agreements.

3. A "Commonality Agreement" is an internal Hughes memorandum of agreement executed by Hughes' program managers responsible for different radar subcontracts. Hughes' objective in implementing Commonality Agreements is to:

(a) define certain tasks which benefit more than one radar subcontract;

(b) establish accounting controls to ensure that the costs collected pursuant to the Commonality Agreements are allocated fairly among the different subcontracts.

4. Hughes implemented its first Commonality Agreement on March 24, 1978. That Commonality Agreement established an account for the pooling of costs associated with the manufacture of radar components that were common to the F-14, F-15 and F-18 radar contracts.

5. On April 13, 1978, Hughes submitted to the Air Force Plant Representative Office ("AFPRO") and the Defense Contract Audit Agency ("DCAA") an amendment to Hughes' Cost Accounting Standards ("CAS") Disclosure Statement for the Radar Systems Group Manufacturing Division, dated April 4, 1978. The amended Disclosure Statement described Hughes' Commonality accounting methodology:

> Direct labor cost incurred in the manufacture of common hardware is collected

in a holding account and is allocated to contracts based on requirements times standards.

6. Hughes' CAS Disclosure Statement is a written description of Hughes' cost accounting practices and procedures. Prior to the award of a government contract, the government's Administrative Contracting Officer is responsible for reviewing the contractor's Disclosure Statement for adequacy and compliance.

7. Hughes April 13, 1978 amendment to its Disclosure Statement was approved by the responsible government official.

8. In April 1978, Hughes provided the AFPRO and the DCAA with a briefing explaining the details of the Commonality accounting system, *i.e.*, how Commonality costs are collected in the cost pool (holding account) and how, in what percentage, the costs are allocated from the pool to the particular subcontracts.

9. Additional discussions occurred between Hughes and the AFPRO in 1978 and 1979 related to Commonality. Joseph R. Rohlinger, then Hughes Radar Systems Group controller, discussed Commonality cost sharing arrangements with AFPRO representatives Andrew A. Zalenski and Len Beder during that time period. Mr. Rohling informed the government that while Commonality cost sharing was then occurring only within Hughes' Manufacturing Division with regard to the manufacture of common hardware, Hughes was intending to employ the same Commonality accounting methodology for future radar engineering efforts within its Engineering Division.

B. Disclosure of Commonality to the Air Force and Northrop in Hughes' B-2 Proposal

10. Hughes began competing for the B-2 avionics in 1978. In 1979, Hughes was an unsuccessful competitor on the Lockheed B-2 proposal. In 1980, Hughes again was invited to compete with Westinghouse for the radar avionics on the Northrop B-2 proposal to the Air Force. Hughes won the radar avionics competition and Northrop won the Air Force prime contract on the B-2 Development Program.

11. In 1981, prior to Hughes receiving the B-2 radar subcontract, Air Force personnel examined the possibility of the B-2 radar employing components that would be common with other radars. They encouraged Northrop as well as its subcontractors to employ Commonality throughout the B-2.

12. On March 27, 1981, Hughes submitted its B-2 radar proposal to Northrop which stated that Hughes' design approach incorporated a "high degree of commonality with F-15 and F/A-18" data processing modules.

13. On August 14, 1981, the Air Force's technical advisor for avionics engineering, Ronald Longbrake, and the Air Force's chief engineer for the B-2, John Griffin, requested that Hughes submit a "Commonality White Paper" to identify and describe development efforts on the B-2 that could also be utilized for other concurrent radar programs.

14. Hughes' original B-2 technical proposal informed Northrop that Hughes believed that the B-2 radar could utilize certain radar components derived from other Hughes radar systems. Hughes described the possibility of using a Radar Data Processor ("RDP") unit that was similar to the one already in use in the F-18's radar.

15. Hughes' original B-2 technical proposal also described an Analog Signal Converter ("ASC") unit that could be derived

from the ASC developed in an earlier Hughes-funded demonstration project.

16. Hughes' technical proposal for the B-2 radar described conceptual approaches to meet the Air Force's performance specifications. The proposal did not represent a promise by Hughes to build the radar according to the configurations described in the proposal. It was understood by Hughes, Northrop and the Air Force that the design of the radar was entirely the prerogative and responsibility of Hughes; that design was required only to achieve the performance requirements of the subcontract within the size and weight constraints specified.

C. The B-2 Radar Subcontract

17. In December 1981, Hughes was notified that it had been awarded the B-2 radar subcontract. Northrop and Hughes executed a letter subcontract on March 8, 1982, and the subcontract was made definite between Hughes and Northrop on October 24, 1982. The subcontract was a cost-plus incentive fee type contract under which Hughes agreed to design and develop a complex, new radar for the B-2. In return, Hughes would be paid for all of its costs incurred for that effort, plus a fee or profit in an amount which would be reduced to a "floor" amount as the actual cost incurred for the effort exceeded the original estimate.

18. The B-2 radar subcontract specified the functions and technical performance requirements of the radar, but did not define or describe its configuration or the hardware to be used. The subcontract stated that the radar "will undergo technical definition, design, layouts, trade studies and development process in order to define the required weapon system."

19. Neither the March 8, 1982 letter subcontract nor the October 4, 1982 B-2 radar subcontract specified the hardware

to be used in the radar. The subcontract did not require use of the F-18's RDP or the particular ASC which were identified in Hughes' original B-2 proposal.

20. The October 4, 1982 B-2 radar subcontract provided that it "shall constitute the entire and complete agreement between the parties and shall supersede the Letter Subcontract, all prior correspondence and other communications, including the provisions of any Request for Proposals from Buyer or any Proposals from Seller."

21. There is no language in the B-2 radar subcontract that supports or that in any way could form the basis for the allegation in Schumer's complaint in paragraphs 16-18, that the B-2 radar subcontract specified or required the employment of "the existing Hughes F-15 APG-63 and F-18 radar processing modules."

D. The F-15 MSIP Program

22. The Air Force had begun discussions with McDonnell Douglass Corp. ("McAir") sometime in 1980-81 regarding upgrading and enhancing the existing F-15 aircraft, including its radar system. These upgrade efforts for the F-15 became designated as the "F-15 Multistage Improvement Program" or "F-15 MSIP." Hughes was the subcontractor selected to develop the F-15 MSIP's upgraded radar system. The F-15 MSIP radar development subcontract was issued in two stages.

23. The first stage of the F-15 MSIP contract effort started in June 1982, and the subcontract, Purchase Order E21009L, was formally issued to Hughes on November 4, 1982. This subcontract required Hughes to "initiate design and development" of an RDP.

24. None of the direct costs associated with the first F-15 MSIP subcontract were shared with any other program. There was no Commonality Agreement involving that subcontract;

none of the subcontract costs were charged to or allocated from any Commonality cost pools.

25. Schumer has admitted that he has no personal knowledge of any cost sharing involving the first MSIP subcontract.

26. On July 23, 1982, Hughes submitted its proposal for the second stage of the F-15 MSIP program. Hughes proposed a development effort which included the design and development of the advanced RDP begun under the first stage of the F-15 MSIP program. The second F-15 MSIP subcontract, Purchase Order E31011R, was awarded to Hughes on February 3, 1983.

E. The Air Force Encouraged Hughes to Develop a New Radar Data Processor which would be Common Between the B-2 and F-15 MSIP

27. Shortly after Hughes was awarded the B-2 subcontract, Hughes B-2 program manager, David Lynch, began a series of meetings with Northrop's radar manager, Robert Davis, the Air Force's technical advisor for avionics engineering, Ronald Longbrake, and the Air Force's avionics systems integration engineer, Terry Tucker, regarding:

(a) B-2's use of common radar hardware already in existence; and

(b) the possible development of new radar units in common with other Hughes radar development programs which were contemplated but not yet under contract, including the F-15 MSIP.

28. Originally, the B-2 mission was that of a high altitude airplane. Hughes' original suggestion to use the F-18's RDP was conceived with that mission in mind.

29. In late 1981-early 1982, the Air Force directed a change to the B-2's mission—the B-2 would fly at both high and low altitudes. This mission change had an impact on the B-2's

radar, including the performance requirements for the B-2's RDP. In order to accomplish the new performance requirements, the B-2's RDP needed increased processing capacity over and above that of the F-18's RDP which Hughes had originally suggested for use on the B-2.

30. In Spring 1982, Hughes discussed with Northrop and Air Force personnel the need to develop a new, advanced RDP with increased processing capacity. The Air Force determined that it would be advantageous if Hughes could develop advanced RDP that could be used in both the B-2 and the F-15 MSIP radars.

31. The change in the B-2's mission necessitated Hughes developing an advanced RDP. Had the F-15 MSIP program not already embarked on that development effort, the B-2 program would have had to fund the entirety of the advanced RDP itself.

32. The Air Force's technical advisor for avionics engineering, Ronald Longbrake, discussed RDP Commonality between B-2 and F-15 MSIP with the Air Force's chief engineer on the F-15, John Griffin.

33. The Air Force's avionics systems integration engineer, Terry Tucker, monitored the advanced RDP development effort undertaken on the F-15 MSIP program and was involved in fostering the RDP's Commonality between the B-2 and F-15 MSIP.

34. On December 7, 1982, Hughes gave a detailed oral and written presentation to Northrop regarding the B-2's use of common modules from the advanced RDP which were being developed for the F-15 MSIP radar. The presentation described benefits of RDP Commonality.

F. Disclosure of RDP Commonality Agreement

35. At the December 7, 1982 presentation, Hughes described to Northrop the following funding arrangements that would result from the B-2's utilization of modules common with the F-15 MSIP's RDP:

(a) Hughes would charge all of the development costs for common RDP modules and support software to the F-15 MSIP subcontract; and

(b) the development of modules and software that were unique to the B-2 would be charged to the B-2 subcontract.

36. The written briefing materials also informed Northrop that the cost sharing would be accomplished by a "Commonality Agreement with F-15 program."

37. On December 14, 1982, Hughes' program managers for the F-15 and B-2 executed a Commonality Agreement, entitled "Development of Advanced Radar Data Processor (RDP)." (This Commonality Agreement is identified as "Agreement 1" in Schumer's complaint.)

38. Consistent with what Hughes had informed Northrop at the December 7, 1982 briefing, the December 14, 1982 Commonality Agreement identified the software and the eight common modules for which F-15 would "continue funding all development efforts."

39. The December 14, 1982 RDP Commonality Agreement defined the "development" stage during which all of the costs associated with the Commonality efforts would be charged entirely to the F-15 MSIP subcontract:

> This effort shall include the generation and formal initial release of all production documentation such as drawings, test requirements, and associated test and diagnostic software for the above [common] modules.

Production drawing release is a formal sign-off procedure which reflects the completion of design development.

40. The December 14, 1982 RDP Commonality Agreement defined the point in time when certain costs associated with improvements and upgrades to the common modules would be shared equally between the B-2 and the F-15 MSIP programs:

> Subsequent to production drawing release, refinements/changes mutually agreed to by the using programs shall be funded on an equal basis. Changes to common hardware required by unique program requirements will be funded by that program.

The Commonality Agreement provided that manufacturing costs associated with the common RDP modules would be allocated to both programs based on the quantity of modules delivered to each program.

41. On January 23, 1983, Hughes' B-2 Program Manager David Lynch discussed the December 14, 1982 RDP Commonality Agreement with Northrop's radar manager, Robert Davis. On January 25, 1983, Mr. Lynch reviewed the terms of the Commonality Agreement with Mr. Davis and provided him with a copy of the Commonality Agreement.

42. Northrop's radar manager, Robert Davis, understood that Hughes had promised Northrop that Hughes' F-15 MSIP subcontract would bear all of the development costs of the common RDP modules up to the point of production drawing release, and thereafter, costs for improvements and upgrades that were common to both programs would be shared equally between the B-2 and the F-15 MSIP subcontracts.

43. On February 24, 1983, Northrop confirmed with Hughes that it concurred with Hughes' recommendation to change the RDP's configuration from a design derived from the F-18's RDP to a design that was undergoing development on the F-15 MSIP program. Northrop's approval of the change in the RDP's configuration did not establish any fixed price for the full scale development of the B-2 radar's RDP.

44. Northrop's and the Air Force's concurrence with the change in the RDP's configuration was based, in part, upon the disclosure to Northrop and the Air Force of the cost sharing arrangement between the B-2 and the F-15 MSIP subcontracts that was set forth in the December 14, 1982 RDP Commonality Agreement.

45. The December 14, 1982 RDP Commonality Agreement was re-executed by Hughes on June 24, 1983, but with no substantive changes made to the previous RDP Commonality Agreement. (This Commonality Agreement is identified as "Agreement 2" in Schumer's Complaint.) Hughes' B-2 program manager, David Lynch, provided Northrop's radar manager, Robert Davis, with a copy of the June 24, 1983 RDP Commonality Agreement shortly after the document was executed.

46. Consistent with the terms of the June 24, 1983 RDP Commonality Agreement, the costs incurred by Hughes for the design and development of the RDP modules that were common between the B-2 and the F-15 MSIP were charged directly and exclusively to the F-15 MSIP subcontract. None of these costs were charged to the B-2 subcontract.

47. As set forth in the RDP Commonality Agreement, the only RDP costs which were charged to Commonality pools and shared between the B-2 and the F-15 MSIP were for:

(a) improvements and upgrades to the design which were required by the B-2's scope of work, and

(b) the deliverable hardware received by the B-2.

48. On June 11, 1984, Hughes notified Northrop that most of the RDP design was completed. By the Fall of 1984, the first RDP hardware had been completed.

G. Development of the Gate Array Enhanced Analog Signal Converter began on the B-2 Subcontract

49. Hughes originally believed that the B-2 radar could utilize an ASC configuration that had been developed in the late 1970s and early 1980s under the auspices of the F-15 program and which had been funded with Independent Research & Development ("IR&D") and Hughes' company funds.

50. In early 1982, it became apparent to the Air Force that the weight of the B-2 aircraft would hinder its performance. Thus, Hughes directed its development efforts to find ways to reduce the overall weight of the B-2's radar.

51. To satisfy the B-2's performance specification and to help achieve weight reduction, Hughes changed the configuration of the ASC. Instead of placing the ASC in its own separate box, Hughes' new configuration relocated the ASC within another of the radar's boxes called the Receiver/Exciter.

52. The performance specifications required by the contract could be accomplished within this new configuration by using "gate array" technology. Gate arrays are silicon chips containing microtransistors that reduce the size of the component into which they are integrated.

53. On April 12, 1982, Hughes presented to Northrop its first configuration drawing of the ASC which would require the design and development of gate arrays.

54. On April 21, 1982, Hughes' B-2 program manager David Lynch gave a briefing to Northrop and the Air Force which described the new ASC configuration.

55. In 1982, when Hughes committed to design and develop the gate array enhanced ASC for the B-2 subcontract, Hughes had no other radar contract under which this effort had been authorized, and the F-15 customer did not authorize the gate array enhancements to the ASC until 1984.

56. Since the design and development of the gate array enhanced ASC was undertaken to satisfy the performance requirements of the B-2 subcontract, all of the costs incurred for that effort were properly chargeable to that subcontract.

H. Hughes did not "Double Price" the B-2's Gate Array Enhanced ASC on the F-15 MSIP Subcontract

57. In August 1982, as part of the first stage of the F-15 MSIP subcontract, Hughes presented McAir with a briefing on the status of the development of the MSIP radar. In the briefing, Hughes identified for McAir the study efforts it wanted to pursue for the ASC among which were "gate arrays for the digital logic to minimize power consumption/cooling requirements and hardware size."

58. Hughes' briefing materials informed McAir that Hughes was examining "other programs for parts commonality so as to minimize cost and schedule impact."

59. In November 1982, Hughes presented to McAir the results of its feasibility study in a design status review briefing that revealed the various advantages of incorporating gate array technology into the F-15 MSIP's ASC, such as: higher packaging density, reduced power needs and increased reliability resulting from fewer parts and improved circuit connections.

60. Hughes formally proposed to McAir the utilization of the gate array enhanced ASC for the F-15 MSIP radar for the first time on January 4, 1983. Since the gate array enhanced ASC was not required to meet the performance specifications of the F-15 MSIP radar, Hughes set forth its proposal as an option to the second F-15 MSIP radar subcontract.

61. Hughes' January 4, 1983 F-15 MSIP proposed option for the gate array enhanced ASC informed McAir that "[f]or the past year, Hughes has been evaluating gate arrays for use in Analog Signal Processors." The proposal went on to discuss that several suppliers of gate arrays had been evaluated already.

62. Hughes' January 4, 1983 F-15 MSIP proposal informed McAir that gate arrays for the ASC represented current research activity at Hughes on some other Hughes program that was not identified in the proposal. McAir's F-15 Radar Subsystem Manager, John R. Fahey, knew that another Hughes program was involved in the development of a gate array enhanced ASC.

63. On February 3, 1983, McAir awarded the second F-15 MSIP subcontract to Hughes. Because of funding limitations, McAir did not exercise the option for the gate array enhanced ASC.

64. On April 25, 1983, Hughes submitted to McAir a proposal again offering to McAir an opportunity to incorporate the gate array enhanced ASC into the F-15 MSIP radar subcontract.

65. Hughes' April 25, 1983 proposal to McAir was submitted in the form of an engineering change proposal (designated as RCP/CCP M001), for the incorporation of the gate array enhanced ASC for the F-15 MSIP radar.

66. On September 1, 1983, Hughes submitted to McAir its cost and pricing data in support of its proposal price for the

incorporation of the gate array enhanced ASC for the F-15 MSIP radar. Hughes' supporting data stated that the proposed cost "includes only those unique efforts to apply technology to F-15."

67. In the course of the negotiation process, Hughes submitted cost or pricing date to support the estimated labor hours and costs proposed to McAir. "Cost or pricing data" is that factual information that relates to the buyer's assessment of the reasonableness of the proposed price. The detailed backup data to the proposed price submitted to McAir during the negotiation process further stated that the engineering design hours used to calculate Hughes' price, "take into account commonality." This language together with the language in the January and September 1983 proposal documents made it clear to McAir that the F-15 MSIP subcontract would not bear the entire costs of the gate arrayed ASC development effort.

68. On January 13, 1984, McAir approved Modification 001 to the second F-15 MSIP subcontract authorizing the development of the gate array enhanced ASC, which had been proposed by Hughes in RCP/CCP M001.

I. B-2 Security Requirements Precluded Hughes from Directly Disclosing to McAir the Existence of the B-2 Program

69. Hughes was severely restricted from providing McAir or the Air Force's F-15 program office with any information regarding the B-2 program, which in 1983 was highly classified. Even the existence of the B-2 Bomber was classified, as was Hughes' relationship to the B-2 program. The B-2's security requirements precluded Hughes from mentioning the existence of the program to anyone who did not have the

required special access program clearance, which included all McAir personnel.

70. In January 1982, in order to foster Commonality between the B-2 and the F-15 MSIP without breaching the B-2s security requirements, John Griffin, who had been the Air Force's chief engineer on B-2 prior to becoming chief engineer on the F-15, became responsible for conferring with the Air Force's F-15 Program Office regarding radar commonality between the B-2 and the F-15 MSIP program.

71. In 1983, during the period in which Hughes was proposing to McAir the incorporation of the gate array enhanced ASC for the F-15 MSIP radar, the existence of the B-2 Bomber was still secret, as was Hughes' relationship to that program. The B-2 radar subcontract, along with the Security Requirements Manual which is still classified, required Hughes to take specific actions to preserve the secrecy of the B-2 program, including the use of "cover stories" to fool or confuse individuals not accessed to the B-2 program.

72. While Hughes was able to and did make vague references to McAir concerning another Hughes radar program that was developing the gate array enhanced ASC, Hughes could not provide McAir with any information which could lead McAir to speculate that Hughes was performing work on the highly classified B-2 project.

J. Hughes Established a Commonality Agreement to Share Costs for the Development of the ASC

73. During the B-2's System Design Review which occurred between March 31 and April 12, 1983, Hughes briefed Northrop and the Air Force regarding Hughes' proposal to McAir for the incorporation into the F-15 MSIP of the gate array enhanced ASC. Mr. Lynch pointed out that if Hughes could develop the gate array enhanced ASC so that a number

of common modules could be used in both the B-2 and F-15 MSIP radars, the government would accrue cost savings from the sharing of Hughes' development costs between the two programs, as opposed to each program paying 100% of a development effort. Hughes identified the B-2's ASC components and modules that it hoped could be made common with the F-15 MSIP radar.

74. In May 1983, prior to McAir's formal approval of the subcontract modification for the gate array enhanced ASC, Hughes began to incur costs in anticipation of McAir's approval. These "precontractual" costs were incurred at Hughes' own risk but were necessary to preserve the F-15 MSIP development schedule in view of what was believed to be the likelihood of approval by the Air Force and McAir of the subcontract modification. The "precontractual costs were at Hughes' own risk, in the sense that if McAir approved the modification, the costs could properly be charged to the F-15 MSIP subcontract; if McAir had not approved the effort, Hughes could not have charged the costs to the F-15 MSIP subcontract. Such precontract costs were incurred with the knowledge and assent of McAir.

75. On June 24, 1983, Hughes implemented a Commonality Agreement between the F-15 program and the B-2 program to establish "the funding responsibilities of each program as regards the development and fabrication tasks associated with the Analog Signal Converter."

76. The June 24, 1983 ASC Commonality Agreement provided as follows:

(a) the costs for design and development of ASC components that were common between the B-2 and F-15 MSIP would be shared equally between the two subcontracts;

(b) subsequent to production drawing release, costs for improvements and upgrades that were mutually agreed to by the two programs would be shared;

(c) the costs of performing any work in satisfaction of requirements that were unique to only one of the radar programs would be charged solely to that program;

(d) the costs of fabricating hardware would be shared on a pro-rated basis in direct proportion to the quantity of hardware delivered to each program;

(e) costs of test equipment and common software development would be shared by the two programs.

77. The June 24, 1983 Commonality Agreement was provided by Hughes to Northrop's radar manager, Robert Davis, shortly after it was executed.

78. In June 1983, Hughes established two Commonality pool (holding) accounts to collect costs associated with (a) the design and development of the ASC common modules, and (b) the fabrication of hardware. The costs collected in these Commonality pool accounts ultimately were allocated to the F-15 MSIP subcontract and the B-2 subcontract in accordance with the terms of the June 24, 1983 ASC Commonality Agreement.

K. Hughes Disclosed its Commonality Accounting Practices to the Government

79. In June 1983, Hughes created the Commonality pool accounts to collect the costs associated with the improvement/upgrade effort and hardware production of the common modules for the RDP. The pooled costs were then to be allocated to the B-2 and F-15 MSIP subcontracts in accordance with the terms of the June 24, 1983 RDP Commonality Agreement.

80. During the second half of 1983, the RDP was still undergoing development, the cost of which was charged directly to the F-15 MSIP contract. Therefore, the costs incurred in the RDP Commonality pools were minimal.

81. In November 1983, Hughes RSG's Controller, Joseph Rohlinger, notified the government's AFPRO office at Hughes of the RDP Commonality pool accounts. He further notified the government that Hughes was in the process of revising its CAS Disclosure Statement to describe the Commonality accounting practice for allocating common development costs.

82. Hughes' CAS Disclosure Statement, effective January 2, 1984, disclosed to the government the Commonality accounting practices for both Hughes' Manufacturing and Engineering Divisions:

> Direct labor cost incurred for engineering design, support and manufacture of common hardware is collected in a holding account and is allocated to contracts based on contemplated requirements.

L. Hughes Proposed Commonality for its F-14D Radar Development Subcontract

83. In 1984, the Navy contracted with Grumman Aerospace Corporation for an upgraded version of the F-14 aircraft, designated as the F-14D. Grumman's prime contract contained a provision entitled "Commonality" which specifically encouraged Grumman and its subcontractors to incorporate as many common components from other Navy aircraft as was practical. The provision further noted that "Commonality should reduce the initial cost of purchasing the component."

84. The Navy directed Grumman to procure the F-14D radar from Hughes. On June 21, 1984, Hughes and Grumman executed a Memorandum of Understanding under which

Hughes was to develop a new radar for the F-14D aircraft. The parties agreed that the subcontract would be a firm fixed price subcontract, with the final fixed price to be determined in subsequent negotiations.

85. The provision encouraging commonality in the Grumman prime contract from the Navy, also stated "[i]n order that the advantages of commonality on both programs can be maximized, the Navy desires to determine, at the earliest possible date, whether the MSIP radar being developed by the [U.S. Air Force] can be effectively utilized as an alternative for F14D radar upgrade called for under this contract." Thus, Grumman was directed by its contract with the Navy to pursue commonality with the advanced radar being developed by Hughes under the F-15 MSIP and B-2 contracts, although the participation of B-2 was unknown to Grumman at the time.

86. In June or July 1984, Hughes provided Grumman with a series of briefings to explain the radar components that were undergoing design and development at Hughes in connection with the F-15 MSIP contract, including the advanced RDP, RSP and ASC.

87. Because of the B-2's security restrictions, Hughes could not disclose to Grumman the existence of the B-2 program. Instead, Hughes disclosed to Grumman that the advanced RDP and gate array enhanced ASC were undergoing development as part of the F-15 MSIP program.

88. The development of the advanced RSP had begun in early 1982 using Hughes' company funds and Independent Research and Development funds. In January 1984, McAir had authorized Hughes to continue the development of the advanced RSP under the F-15 MSIP subcontract through its approval of RCP/CCP M001.

89. The B-2 radar subcontract did not require the use of the advanced RSP and there is no evidence it paid for or utilized that radar component.

90. After Hughes provided technical proposals to Grumman describing the advanced RDP, the gate array enhanced ASC, and the advanced RSP, Grumman and Hughes executed another Memorandum of Understanding on September 14, 1984 which directed Hughes to "proceed with the Full Scale Development (FSD) of the MSIP-Enhanced F-14D Radar System." The Memorandum further provided for "evaluation of the potential for effectively utilizing elements of the USAF [Air Force] F-15 MSIP radar upgrade as an alternative to the F-14D radar upgrade."

91. Grumman formally notified Hughes on September 21, 1984, that a contract modification would be prepared for the Navy's approval to authorize the "MSIP configuration" for the F-14D radar. In the meantime, this notification authorized Hughes to begin immediately incurring costs on the F-14D for incorporating the advanced RDP, the gate array enhanced ASC, and the advanced RSP into the F-14D's radar.

92. Grumman believed that utilizing the "MSIP technology" would (a) enhance Grumman's ability to comply with its delivery schedule; (b) enable Grumman to comply with the Commonality provision in its prime contract, and (c) reduce the overall cost to Grumman and the Navy. The Commonality provision contained in Grumman's prime contract with the Navy was included in Grumman's subcontract with Hughes.

M. Hughes' Commonality Agreements were Revised to Include the F-14D Subcontract

93. On February 8, 1985, Hughes' F-15, F-14 and B-2 program managers executed a revised Commonality Agreement which noted "[t]he initial development phase for the common

RDP hardware has been funded solely by the F-15 MSIP program and has been completed." (This Commonality Agreement is identified as "Agreement 4" in Schumer's complaint.)

94. The February 8, 1985 Commonality Agreement provided that funding for improvements and upgrades to the RDP's common hardware would be shared equally (1/3 each) among the B-2, F-15 MSIP and F-14D subcontracts.

95. The February 8, 1985 Commonality Agreement provided that costs for the design and development of common ASC components would continue to be shared equally between the F-15 MSIP and B-2 subcontracts and not charged to the F-14-D subcontract.

96. The February 8, 1985 Commonality Agreement provided that the costs of improvements and upgrades (i.e., following design and development) to the common ASC components that were authorized by the F-15 MSIP, B-2 and F-14D programs would be charged in equal thirds to those three subcontracts.

97. The February 8, 1985 Commonality Agreement stated that the advanced RSP was still undergoing development under the F-15 MSIP subcontract. Design and development costs would continue to be charged exclusively to the F-15 MSIP subcontract.

98. The February 8, 1985 Commonality Agreement provided that the costs of improvements and upgrades to the common RSP components that were authorized by the F-15 MSIP and F-14D programs would be shared equally by those two subcontracts.

99. Like the previous Commonality Agreements, the February 8, 1985 Commonality Agreement provided that the costs of fabricating common hardware would be shared between the three subcontracts on a prorated basis in direct

proportion to the quantity of hardware delivered under each subcontract.

100. The February 8, 1985 Commonality Agreement was provided by Hughes to Northrop. Both Northrop's radar manager, Robert Davis, and Northrop's subcontracts manager, Richard Blakeney, were provided with copies of this Commonality Agreement in February 1985.

101. On April 8, 1985, Hughes F-14 Contract Negotiator, Ben Kaufman, provided a copy of the February 8, 1985 Commonality Agreement to Grumman's subcontracts project manager, William Powers.

N. The Costs of Improvements and Upgrades to the Design of the Advanced RDP were Shared in Accordance with the Commonality Agreements

102. The February 8, 1985 Commonalty Agreement described an improvement/upgrade effort for the RDP, the cots of which would be charged to a Commonality cost pool and allocated in equal thirds to the F-15 MSIP, the B-2 and the F-14D programs.

103. The improvement/upgrade effort defined in the February 8, 1985 Commonality Agreement involved implementing a dual Central Processing Unit ("CPU") for the RDP—an effort that was required to meet the performance specifications of the B-2 radar. The dual CPU for the RDP had been authorized by Northrop for the B-2 radar in October 1984.

104. Since the dual CPU was required for the B-2, Hughes could have elected to charge the costs associated with that effort entirely to the B-2 cost reimbursement type subcontract. Instead, Hughes shared these costs with the F-15 MSIP and F-14D, both of which were fixed price type subcontracts.

105. There is no credible evidence that the costs incurred for the RDP improvement/upgrade effort were allocated in a manner inconsistent with the terms of the February 8, 1985 Commonality Agreement.

O. The June 19, 1985 Commonality Agreement Provided for the Sharing of Sustaining Engineering Costs

106. Following the initial design/development and the improvement/upgrade of the advanced RDP, the advanced RSP, and the gate array enhanced ASC, Hughes began to incur cots to "sustain" the common components. Sustaining engineering is the effort required to maintain or modify an already developed item during the period in which the item is being manufactured.

107. The "sustaining engineering" phase was defined in the June 19, 1985 Commonality Agreement. (This Commonality Agreement is identified as "Agreement 5" in Schumer's complaint.) This Commonality Agreement was provided by Hughes to Northrop in June 1985.

108. The June 19, 1985 Commonality Agreement provided that sustaining engineering costs for the common modules would be shared between the B-2, F-15 MSIP and F-14 programs. Sustaining engineering costs for components common to all three subcontracts were to be shared in equal thirds; components common to only two of the subcontracts were to be shared 50/50.

109. The sustaining engineering costs were allocated in accordance with the terms of the June 19, 1985 Commonality Agreement.

P. The Commonality Agreements were Disclosed to Grumman During the Course of Negotiations on the Final Price of the F-14D Radar Subcontract

110. In 1986, Hughes believed, based on information from the government, that it was then permissible under the B-2's security requirements to disclose to its F-15 MSIP and F-14D customers the Commonality Agreements and accounting procedures and that costs were being shared with an unidentified classified program.

111. On March 26, 1986, Hughes provided both Grumman and McAir with a briefing regarding Hughes' Commonality Agreements. The briefing included a presentation on Hughes' Commonality accounting procedures.

112. On December 8, 1986, Hughes executed and submitted to Grumman its "Certificate of Current Cost or Pricing Data" in connection with the parties' agreement on the price of the F-14D subcontract. Hughes' certificate listed the documents that represented Hughes' disclosure to Grumman of its cost or pricing data. Included in the list was Hughes' "Commonality presentation and other related Commonality documents provided to GASD [Grumman] on 26 March 1986".

113. The firm fixed price negotiated between Hughes and Grumman for the F-14D subcontract took into account the Hughes Commonality Agreements which affected the F-14D radar.

114. Schumer admits that he had no responsibility for or involvement with the F-14 program, never read any of the F-14 contracts, and never had any discussions regarding any of the issues involved in the case with any Grumman people on the F-14 program.

Q. Hughes' F-18 Subcontracts Shared Only Costs of Manufacturing and Sustaining Engineering.

115. Since the late 1970s, Hughes has produced radars for the F-18 aircraft pursuant to a series of annual radar production subcontracts with McAir. Since the time of Hughes' first

Commonality Agreement executed on March 24, 1978, the F-18 program has shared manufacturing costs associated with the common RSP components.

116. None of Hughes' Commonality Agreements provided for the sharing of any design and development costs with any F-18 subcontract, and, in fact, no such costs were shared by the F-18 with any other program.

117. The June 19, 1985 Commonality Agreement (described in ¶ 112 above) was revised by Hughes on May 8, 1987. (This revised Commonality Agreement is identified in Schumer's complaint as "Agreement 6.") Hughes' F-18 radar utilized one of the advanced RDP components—the firm memory module—that had been developed under the F-15 MSIP subcontract. Since that module thus became common among all four programs—F-15 MSIP, B-2, F-14D and F-18—the Commonality Agreement provided that all four programs would share in the sustaining engineering costs for that particular RDP component.

118. Schumer admits that he never worked on the F-18 program, never read any of the proposals or contracts, and does not know what was disclosed to McAir by Hughes about the cost-sharing involving the F-18.

II. CONCLUSIONS OF LAW

1. Fed. R. Civ. P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. A party moving for summary judgment and not bearing the burden of proof at trial need not negate the other party's case. Rather, the moving party may discharge its bur-

den by demonstrating the absence of an essential element of the case of the opponent, who bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

3. The test for determining whether a genuine issue of material fact exists is whether the evidence is sufficient to sustain a verdict for the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). The evidence is not sufficient to sustain a verdict for Schumer in this case.

4. Hughes did not knowingly present or cause to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

5. Hughes did not knowingly make, use, or cause to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

6. Hughes did not conspire to defraud the Government by getting a false or fraudulent claim allowed or paid.

7. Schumer has not shown that Hughes violated the False Claims Act.

Dated: May 19, 1992

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

EXHIBIT F

DEFENSE CONTRACT AUDIT AGENCY
WESTERN REGION
RESIDENT OFFICE
HUGHES CORPORATE OFFICE
P.O. BOX 92489 (S64/C130)
200 N. SEPULVEDA BLVD
LOS ANGELES, CA 90009-2489

IN REPLY REFER TO
4511/92I49100001/tn 10 July 1992

MEMORANDUM FOR DIVISIONAL ADMINISTRATIVE CONTRACTING OFFICER, DPRO HUGHES LOS ANGELES

SUBJECT: Determination of the B-2 and F-15 Disclosure Statement and CAS 401 Noncompliance Issue

Reference is made to your letter, dated 14 November 1991, and our Audit Report No. 4511-91B44200001-S1, dated 21 May 1991.

The contractor has demonstrated to us that if the commonality pooling concept had not been instituted, the B-2 cost-type contract would have incurred all the development costs associated with the gate array enhanced Analog Signal Converter (ASC). Incorporating the commonality pooling concept, allowed the F-15 fixed-price-incentive contract to share in the ASC's common development costs, which would have otherwise been fully charged tp[*sic*] tje[*sic*] B-2 contract. The B-2 contract would have incurred all the development costs, because the ASC's gate array technology was first

considered for incorporation into the B-2's radar system. Had the B-2 contract absorbed all these development costs, the government would had [*sic*] paid more for the gate array enhanced ASC.

The contractor has demonstrated to us that its bidding and accumulating of costs was in compliance with CAS 401 during the period of December 1982 through 2 January 1984. The contractor accumulated costs at a more detail level than it bid them in its proposals. The contractor's proposal for the B-2 did not bid at the level of detail that disclosed the pooling of common costs. After the definitization of the B-2 contract, communication between the contractor and its customer, Northrop Corporation, indicates that the customer was aware of the contractor's intent to develop common radar components. The contractor's cost ledger accumulated costs at a detailed level, by account, which were later allocated to final cost objectives according to commonality agreements. The standards allow the bidding of costs at a lesser level of detail than the accumulation of such costs. However, the contractor's practices were not disclosed and therefore not in compliance with its disclosure statement for the same period.

Since the noncompliance, as stated in our referenced audit report, had not revealed a significant cost impact, it is our opinion that the noncompliance us not material.

Any questions may be directed to the undersigned (310) 364-6500.

/s/ Jeffrey L. Mc Gowan
JEFFREY L. Mc GOWAN
Resident Auditor

EXHIBIT G

DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACT MANAGMENT COMMAND
DEFENSE PLANT REPRESENTATIVE OFFICE HUGHES LOS ANGELES
P.O. BOX 92463
LOS ANGELES, CALIFORNIA 90008-2463

IN REPLY REFER TO
DCMDW-RKA 13 July 1992

Mr. Fred McNutt, Group Controller
Hughes Aircraft Company
Radar Systems Group
RE R01 12V09

Dear Mr. McNutt:

Reference is made to the following documents.

1. DCAA audit report #4511-91B44200001, dated 21 Nov 90 (allegation of disclosure statement noncompliance; commonality costs)
2. DCAA audit report #4511-91B4420000-S1, dated 21 May 91 (allegation of CAS 401 noncompliance; commonality costs)
3. DPRO letter to RSG, dated 25 Jul 91 (initial determination of CAS 401 noncompliance and request for cost-impact study)
4. RSG letter to DPRO, dated 30 Aug 91 (request for extension)
5. RSG cost-impact study, dated 8 Oct 91
6. DCAA Memorandum, dated 10 Jul 92

Based upon the DCAA findings under item (6), the CAS 401 noncompliance condition has been withdrawn. Additionally, DCAA has advised the DPRO that RSG's noncompliance with its disclosure statement during the period Dec 82 through Jan 84 is considered to have had an immaterial impact to then Government contract costs.

Based upon the preceding, no further action is required by RSG relative to the noncompliances referenced above.

Please direct any inquiries to Richard Marcantonio at (310) 364-6425 referencing our case #1F130063.

encl:
item 6

/s/ Brian F. Reilly
BRIAN F. REILLY
Divisional Administrative
Contracting Officer

cc:
HAC/Perlberg
DCAA/McGowan